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No. 15700

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ENRIQUE REYES LEYVAS, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment after conviction following trial by jury under Title 21, United States Code, Section 174. Trial was held in the United States District Court for the Southern District of California. Jurisdiction is conferred upon this Court by Title 28, United States Code, Section 1291.

Statement of Facts.

The government agrees in substance with, and incorporates herein, appellants' statement of facts with the following exceptions and additions:

On page five of their brief, appellants state that the record does not disclose what "ounce" refers to (lines

21-22). If appellants would have read further [Rep. Tr. p. 43, lines 11-12],* they would have discovered that an "ounce" was, in the words of Jose Ruiz, an "ounce of heroin." The reaction Jose Ruiz experienced after taking a "fix" from this particular "ounce" also indicates that it was heroin [Rep. Tr. p. 53, lines 10-17].

Appellants' editorial comment (App. Br. p. 13, line 24, to p. 14, line 2)** that the material reported on pages 308-366 of the Reporter's Transcript is irrelevant is not properly within the statement of the case. The relevance or irrelevance was a question for the court and the jury. The facts on those pages of the transcript reveal a portion of a course of dealing within the conspiracy, involving Jose Ruiz, William Holmes, Gilbert Quesada, Henry Ortiz, and Federal Narcotics Agent Benny Poccaroba, among others. During this particular episode, Gilbert Quesada drove Ruiz to the residence of William Pablo Holmes after Holmes had asked Ruiz on the telephone to bring him a spoon of heroin [Rep. Tr. p. 309, lines 4-23; p. 311, lines 5-9]. When Ruiz and Quesada arrived at Holmes' house, Jose Ruiz was introduced to Agent Poccaroba to whom the heroin was to be sold [Rep. Tr. p. 313, lines 9-11]. Jose Ruiz and Holmes then took "fixes" together out of the presence of Agent Poccaroba. Ruiz obtained a reaction similar to those he had experienced on previous occasions when he had taken narcotics fixes [Rep. Tr. p. 315, lines 14-25; p. 316, lines 1-2]. Then Holmes picked up the spoon of heroin in front of his house where Jose Ruiz had deposited it [Rep. Tr. p. 317, lines 5-25]. Shortly thereafter, Holmes arranged

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*Reporter's Transcript, hereinafter cited as Rep. Tr.

**Appellants' Brief, hereinafter cited as App. Br.

another purchase of heroin from Jose Ruiz for Benny Poccaroba [Rep. Tr. p. 321, lines 6-19]. The heroin was subsequently supplied to Jose Ruiz by Rudy Leyvas [Rep. Tr. p. 324, lines 18-25]. Ruiz borrowed Henry Ortiz' car to make the pick-up from Rudy Leyvas. Jose Ruiz and Henry Ortiz then delivered the heroin to Agent Poccaroba [Rep. Tr. p. 331, lines 6-10]. On a later occasion, Henry Ortiz delivered heroin to Poccaroba for Jose Ruiz while the latter watched from an automobile parked across the street [Rep. Tr. p. 361, lines 15-25; p. 362, lines 1-7]. This heroin was also obtained from Rudy Leyvas [Rep. Tr. p. 362, lines 18-25]. It is difficult to acquiesce in the appellants' opinion that this material is irrelevant. Therefore, the government adds it to the statement of facts incorporated herein.

The appellants were once again prone to editorialize on page 25 of their brief where they stated:

> "The testimony of this witness from pages 1429-1452 of the reporter's transcript involves only Louie Encinas and Armando Mendoza, along with Angel Padilla. It is scarcely relevant enough to mention." (Lines 23-26.)

This statement is obviously not part of the facts involved in this case. Furthermore, the relevance of this testimony is explained in a colloquy between government counsel and the court. The purpose of the testimony was to connect Armando Mendoza with the conspiracy through his dealings with Angel Padilla [Rep. Tr. p. 1435]. The government therefore adds this paragraph to the statement of facts to apprise the appellate court of the relevance of this particular portion of Elizabeth Ruiz' testimony.

ARGUMENT.

I.

The Finding of a Single Conspiracy Was Supported by the Evidence. The Acquittal of Certain Co-defendants, at the Close of the Government's Case and After the Close of the Trial Did Not Prejudice the Remaining Defendants-Appellants.

A. The government's theory in this case was that of a single conspiracy which encompassed all of the indicted defendants. At the outset of the case the government was fully aware of the limits imposed by *Kotteakos v. United States,* 328 U. S. 750 [Rep. Tr. p. 2231, lines 11-13], and which is heavily relied upon by appellants. In the *Kotteakos* case, the proof showed eight or more conspiracies, and the government admitted that there was more than one conspiracy (328 U. S. 750, 752). Briefly, in the *Kotteakos* case, several groups of people, independently of one another, induced lending institutions to make loans on the basis of fraudulent information. Only one man, Brown, was common to all the transactions, and each group with which he dealt had no reason to know that Brown was obtaining fraudulent loans for other groups. Each conspiracy in the *Kotteakos* case had a separate end in view and had no interest in the successes of other groups.

In the instant case, the government's theory was that those defendants who were acquitted knew they were dealing in an illegal commodity which could only be obtained outside the United States, when they purchased narcotics from Jose Ruiz, for example, and that they must have known that Ruiz received the "stuff" from someone else, to wit, the Leyvases. In other words, they knew they were

part of a larger business engaged in the distribution and sale of narcotics, and they further knew that their subsequent sales of narcotics were helping the larger scheme to prosper and grow. There may have been separate agreements, but they were all tied together [Rep. Tr. pp. 2230-2234]. This position was upheld in *Blumenthal v. United States,* 332 U. S. 539, a case which was decided subsequently to the *Kotteakos* decision. In *Blumenthal,* the gist of the conspiracy lay in the agreement to illegally sell liquor, even though the salesmen did not actually know who the owner or supplier of the liquor was. The gist of the conspiracy in the instant case lay not in who actually owned or supplied the heroin, but in the agreement to sell or dispose of it regardless of who might own it (*Blumenthal,* pp. 555-556).

Therefore, there was basis in fact and authority to support the government's position that there was one conspiracy. The fact that ten of the alleged co-conspirators were acquitted and dismissed on motion is of no avail on appeal to the remaining co-conspirators because acquittal of some co-conspirators does not necessarily prejudice the other co-conspirators. (*Lazarov v. United States,* 225 F. 2d 319, 328 (6th Cir., 1955), cert. den. 350 U. S. 886, reh. den. 350 U. S. 955; *Baxter v. United States,* 45 F. 2d 487 (6th Cir., 1930).) There was only an honest difference of opinion between the court and the government as to their respective theories of conspiracy [Rep. Tr. pp. 2230-2234; p. 3072, lines 20-22].

B. The instant case is to be distinguished from *Kotteakos v. United States* on still another important ground. In the latter case, the trial judge instructed the jury that there was only one conspiracy which they could not divide

(328 U. S. 750, 767). This instruction, in the words of Justice Rutledge:

> ". . . permeated the entire charge, indeed the entire trial . . . One . . . (effect) . . . was to prevent the court from giving a precautionary instruction such as would be appropriate, perhaps required, in cases where related but separate conspiracies are tried together . . . namely, that the jury should take care to consider the evidence relating to each conspiracy separately from that relating to each other conspiracy charged." (328 U. S. 750, 769, 770.)

In the present case, the court did not include many unconnected conspiracies within the web of one huge conspiracy, but on the contrary, under the court's theory, severed what in considered independent transactions from the conspiracy which was eventually proved and of which appellants were convicted. The court was not only able to give a precautionary instruction, but was painstaking in its admonitions to the jury to exclude the evidence concerning the acquitted defendants [see Rep. Tr. p. 2301, lines 9-25; p. 2302, lines 1-8. Also see App. Br. p. 30, line 25, to p. 31, line 5]. Such an exclusion of evidence as to the remaining defendants is presumed to preclude the possibility of prejudice to such defendants. (*United States v. Delli Paoli,* 352 U. S. 232; *United States v. Nystrom,* 237 F. 2d 218, 225 (3rd Cir., 1956).) (Exclusion of evidence relating to acquittal on certain counts.) In *Blumenthal v. United States,* 332 U. S. 539, 553, the Court in commenting on the exclusion of certain admissions as to some defendants, but inclusion as to others said:

> ". . . the trial court's rulings, both upon admissibility and in the instructions leave no room for

> doubt that the admissions were adequately excluded, insofar as this could be done in a joint trial, from considerations on their question of guilt . . . The direction was a total exclusion, not simply a partial one . . . *The court might have been more emphatic. But we cannot say its unambiguous direction was inadequate. Nor can we assume that the jury misunderstood or disobeyed it.*" (Emphasis added.)

Nor do the cases cited by appellants limit this rule in the instant case. In *Holt v. United States,* 94 F. 2d 90, 94 (10th Cir., 1937) (App. Br. p. 34, line 24), the court states that

> ". . . the testimony . . . was not *expressly* withdrawn from the jury's consideration." (Emphasis added.)

In the instant case, the trial judge expressly and emphatically withdrew the evidence regarding the acquitted defendants [Rep. Tr. p. 2304, lines 1-7; App. Br. p. 30, line 25, to p. 31, line 5].

In *Throckmorton v. Holt,* 180 U. S. 552 (App. Br. p. 34, line 10), the court only departed from the general rule because the evidence to be withdrawn was not adequately pointed out to the jury (see pp. 568 and 569).

Therefore, the government not only proved a single conspiracy of which eleven of the defendants were acquitted, but the court took all reasonable precautions to protect the appellants by giving concise and emphatic instructions to exclude all evidence which had been brought in against the acquitted defendants. The trial judge was also careful to point out that merely because he did not dismiss the appellants the jury was not to infer that he believed that the appellants were guilty [Rep. Tr. p. 2301, lines 12-25; p. 2302, lines 1-8].

II.

Error May Not Be Predicated Upon the Failure of the Trial Court to Give a Specific Instruction on the Law of Circumstantial Evidence on the Court's Own Motion When Such Instruction Was Not Requested by Appellants.

Though appellants have cited much state authority requiring a trial court to give instructions on its own motion as to the weight and effect to be given circumstantial evidence, the Federal Courts require a request whenever *any specific* instruction is desired by a defendant. (*Goldsby v. United States,* 160 U. S. 70, 77; *Gray v. United States,* 9 F. 2d 337, 339 (9th Cir., 1925); *United States v. Corry,* 183 F. 2d 155, 157 (2d Cir., 1950); *Himmelfarb v. United States,* 175 F. 2d 924, 944 (9th Cir., 1948), cert. den. 338 U. S. 860.) This rule is especially clear in the Federal courts with respect to circumstantial evidence. (*Barshop v. United States,* 191 F. 2d 286, 292 (5th Cir., 1951), cert. den. 72 S. Ct. 500; *Macaboy v. United States,* 160 F. 2d 279 (D. C. Cir., 1947); *Herman v. United States,* 48 F. 2d 479, 480 (5th Cir., 1931).) In *Tramaglino v. United States,* 197 F. 2d 928 (2d Cir., 1952), Judge Frank, at page 932, said:

> "Defendants say that a trial judge should have instructed the jury on the alibi defenses . . . and on the circumstantial nature of the evidence . . . They made no such requests, and it has been held in Goldsby v. United States, 160 U. S. 70 . . . and in Kastel v. United States, 2 Cir., 23 F. 2d 156, that these specific matters need not be mentioned in the charge without proper requests."

Since the failure to give the unrequested instruction in this case is not reversible error (*Barshop v. United States,*

supra, at p. 293), it follows that this is not a "plain error of law" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure upon which appellants rely. Moreover, in *Macaboy v. United States, supra,* (at 280), the court noted that the states favoring this rule apply it only when a *conviction* is based *entirely* upon circumstantial evidence, and not where there is direct evidence linking the defendant with the crime. In the instant case, a reading of the record reveals a great preponderance of direct evidence vis-a-vis circumstantial evidence.

It must also be noted that the trial court instructed the jury that:

> "(t)here are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense.
>
> "As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from *all* the evidence in the case." (Emphasis added.) [Rep. Tr. p. 3002, line 21, to p. 3003, line 5.]

This instruction received the stamp of approval of the United States Supreme Court in *Holland v. United States,* 348 U. S. 121, 139-140, where a *refusal* by the trial court to give the instruction appellants in the instant case did not even request was held not to be reversible error.

III.
Courtroom Security Not Error.

Appellants' contention that the posting of marshals at the courtroom exits was prejudicial to them is equally without merit. The safeguarding of the court, counsel, jury, and spectators is best reposed in the discretion of the court. Absent any clear, incontrovertible evidence of prejudice, error may not be bottomed on this exercise of discretion. (*McDonald v. United States,* 89 F. 2d 128, 136 (8th Cir., 1937).)

IV.
There Is No Basis in Fact or in Law to Predicate Error on the Court's Refusal to Order a Daily Transcript for the Defendants.

A. A close reading of the authorities cited by appellants for the proposition that the Court had the inherent power to order a daily transcript for defendants will reveal that there were other bases for the steps taken by the courts in those cases. In *Ex parte United States,* 101 F. 2d 870, the passage quoted on page 48 of appellants' brief refers to the power of the court to render a judgment of dismissal pursuant to the reservation of a point of law. In support of this power, the court noted that the common law of England and Wisconsin authorized this procedure (101 F. 2d 870, 878). In *Ex parte Peterson,* 253 U. S. 300, the passage quoted on page 48 of appellants' brief refers to the traditional use by the court of auditors, commissioners, and special masters, to aid the court where accounts are complex and intricate (253 U. S. 300, 312). This practice clearly had its roots in Courts of Equity before this nation was founded. (*Dowell v. Superior Court,* 47 Cal. 2d 483 (App. Br. p. 51, line 23)), involved

Section 1000 of the California Code of Civil Procedure, which concerns the production of documents from the adverse party, and which is clearly not applicable in the Federal Courts.

Far more persuasive are those cases involving proceedings *in forma pauperis,* which are analogous to the issue presented herein. Recent Federal decisions indicate clearly that the granting of leave to proceed or appeal *in forma pauperis* is almost solely within the discretion of the trial court.

In *Higgins v. Steele,* 195 F. 2d 366, 367 (8th Cir., 1952), the court held that:

> "(l)eave to proceed *in forma pauperis* under 28 USCA §1915 is a privilege, not a right. *Prince v. Klune,* 148 F. 2d 18; *Dorsey v. Gill,* 148 F. 2d 857, 877. An application for leave to proceed *in forma pauperis* is addressed to the sound discretion of the court, and an order denying such an application is not a final order from which an appeal will lie . . ."

This position has been recently followed in *Parsell v. United States,* 218 F. 2d 232, 235 (5th Cir., 1955), and in *Williams v. McCulley,* 131 Fed. Supp. 162 (D. C. La., 1955).

In the instant case, the court was not convinced that the appellants could not afford the cost of a daily transcript [Rep. Tr. p. 1493, lines 9-17]. And it is difficult to understand why appellants, engaged as they were in the lucrative business of trafficking in narcotics, should be allowed to force the government to furnish them a daily transcript at the taxpayers' expense. The trial judge's suspicions as to the ability of appellants Leyvas to pay for a daily transcript were later confirmed when Counselor

Root moved to substitute herself as attorney for the Leyvases:

> "Mrs. Root: . . . we have been retained . . .
>
> The Court: Counsel, I am very much surprised at your being retained, because I am satisfied that you are not doing this from a charitable point of view, but you are being paid.
>
> You know, during the trial of this case the defendants Leyvas contended to this court that they were destitute. At one time they made a motion before this court that the court order a transcript to be presented to them because they didn't have the money to pay for a transcript. They have indicated to me all along that they couldn't afford the expense of a transcript.
>
> Now you come in at this date and you ask to be substituted. I can't understand the position that is being taken." [Rep. Tr. p. 3078, line 20, to p. 3079, line 10.]

In an effort to solve this problem, the court suggested that $1000, impounded at the time of witness William Joseph Smith's arrest, be used to pay for a daily transcript [Rep. Tr. p. 1499, lines 1-6]. This money, which William Joseph Smith alleged Enrique (Henry) Leyvas was coming to collect for past purchases of heroin, was thrown out of a window by Smith immediately before his arrest at his residence [Rep. Tr. p. 1179, line 1, to p. 1180, line 4]. The court's suggestion could not be carried out, however, because the rightful owner or owners failed to claim the money [Rep. Tr. p. 1499, lines 12-16]. In light of this evidence and the broad discretion the law gives the trial judge over this matter, appellants' allega-

tions of error in refusing the request for a daily transcript are without substance.

Moreover, it must be noted that appellants have not shown any abuse of discretion in the court's refusal to furnish them with a free daily transcript. The burden of such a showing is on the appellants. This is especially true since there are no authorities sustaining their contention, and since the trial notes of competent counsel are an effective aid in the day to day conduct of a trial. It should be further noted that appellants were given the use of the transcript for several days, without charge [Rep. Tr. p. 3079, line 24, to p. 3080, line 3].

In the present appeal those appellants who have been granted permission to proceed *in forma pauperis* have been furnished the use of a free transcript of the trial. This is all the law allows them, and it is only at this time (*i.e.,* appeal) that there is authority to give appellants a free transcript. Three of the appellants (Rudy Leyvas, Seferino Leyvas, and Lonnie (Rodriguez) who have not appealed *in forma pauperis,* and who presumably can therefore afford counsel, and who could have afforded to pay for a transcript during the trial, will now reap the full benefits of the free transcript supplied the remaining six appellants.

There is, therefore, no basis for appellants' allegations of error as to the Court's exercise of discretion on this matter.

V.

The Credibility of Jose Vasquez Ruiz Was a Question for the Jury, and the Jury's Determinations as to His Veracity Are Entitled to the Benefit of Every Doubt.

The appellants have alluded many times to Jose Ruiz' past record. As appellants' brief indicates Ruiz' record of crimes and drug addiction was brought out frequently at the trial. The jury had ample opportunity to observe Ruiz and to evaluate his testimony. It is invariably held in the Federal courts that upon appeal from a conviction, the evidence and all inferences drawn therefrom are to be viewed in the light most favorable to the government. (*United States v. Brown,* 236 F. 2d 403, 405 (2d Cir., 1956); *United States v. Lebron,* 222 F. 2d 531, 533 (2d Cir., 1955); *Fields v. United States,* 228 F. 2. 544 (4th Cir., 1955), cert. den. 350 U. S. 982; *Todorow v. United States,* 173 F. 2d 439, 442 (9th Cir., 1949), cert. den. 337 U. S. 925.) Moreover, in answer to the identical argument that appellants are now making, the court in *Dean v. United States,* 246 F. 2d 335, 336 (8th Cir., 1957), said:

> ". . . (I)t is argued that the witnesses as to these transactions were addicts . . . The questions of the credibility of the witnesses and the weight to be given this testimony were, of course, questions for the court. The jury having returned verdicts of guilty, we must assume that all conflicts in the evidence were resolved in favor of the Government, and as we have often said, the prevailing party is entitled to the benefit of all such favorable inferences as may reasonably be drawn from facts proven . . ."

Mesarosh v. United States, 352 U. S. 1, upon which appellants rely has no application here, because in *Mesarosh* the government actually discovered that the testimony of a government witness in that trial was untruthful. Here, there is no such showing, and to say that Ruiz' testimony is tainted is only to state a conclusion without proof. Under these circumstances, all questions of credibility in the instant case should be resolved in favor of the jury's findings.

Conclusion.

1. A single conspiracy was alleged and proved by the Government.

2. The evidence regarding the acquitted co-defendants was excluded by a precautionary instruction which precluded any prejudice to appellants.

3. The trial court correctly instructed the jury as to the burden of proof as required by Federal practice and was not required on its own motion to give any specific instruction as to the nature of circumstantial evidence.

4. The posting of marshals at the exits was solely within the court's discretion, and must be presumed to have been reasonably necessary for the safety of the court, counsel, jury, and spectators and to maintain custody of the 20 odd defendants, some of whom were part of a million dollar narcotics ring.

5. The request for a daily transcript at the expense of the government was properly denied by the trial judge. There is no authority for the granting of such relief, and because it can be inferred that the court had reason to believe the appellants Leyvas could have paid for such transcript.

6. The credibility of Jose Vasquez Ruiz was a question for the jury, and it cannot be assumed that his testimony was tainted.

Wherefore, the Government prays the Judgments of Conviction be affirmed.

Respectfully submitted,

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No. 15704

IN THE

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellant,

vs.

LEO TACKE,

Appellee.

BRIEF OF APPELLEE

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IN THE

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Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The Notice of Appeal in this case refers in the first instance to a final judgment entered on the 26th day of May, 1956 (R. 48). Actually the judgment was entered June 19, 1956 (R. 42). The Judgment by its terms incorporates the Findings of Fact and Conclusions of Law and the Opinion of the Honorable

Charles N. Pray, which Opinion was entered May 26, 1956 (R. 32-37).

The Opinion entered May 26, 1956 sets forth the issues in this case as determined by the Honorable Charles N. Pray, District Judge. The issues in that Opinion together with the Findings of Fact and Conclusions of Law both provide that the evidence preponderates in favor of the plaintiff, appellee here, and against the defendant, appellant here.

The appellant's brief does not set forth a complete statement of the case and we believe that it is proper to set forth a statement of the case in this brief.

This was an action brought under the declaratory judgment Act, 28 U.S.C.A. 2201, in the nature of an action for breach of contract.

While the date that the contract of insurance was ordered is not the basis upon which this case was decided by the District Court, yet throughout appellant's brief an attempt is made to lead this Court to believe that there was an application for insurance made on September 20, 1952. The only evidence in the case is that there was a telephone call on September 20, 1952 to determine why the insurance policy had not been received and this matter was considered by the District Judge and for clarification of that question we quote from the Opinion and Decision:

> "Mrs. Lenora A. Tacke, wife of the plaintiff, Leo Tacke, testified concerning three conversations over the telephone with Mr. Kelly or representatives of his office in connection with ordering the

policy of liability insurance, not including the conversations with the real estate salesman, the first conversation originated when Mr. Kelly telephoned and asked Mrs. Tacke to have Leo Tacke give him an estimate on some lawn work in the back of his rental property, at which time Mrs. Tacke told Mr. Kelly that in appreciation for giving them the lawn work they would take out insurance on the 1948 Chevrolet with him and Mr. Kelly said when they were ready it would be fine; that on September 17th, 1952, Mr. Kelly again telephoned and asked Mrs. Tacke to have her father use his tractor and equipment to clear weeds and rubbish off from a piece of property he had for sale that afternoon and on the occasion of that conservation Mrs. Tacke requested Mr. Kelly to be sure Leo is covered by insurance and Mr. Kelly thanked her; that the policy had not been received and on Saturday morning, September 20th, 1952, she phoned Mr. Kelly's office before 8:30 A.M. and the line was busy and called again a few minutes after 9:00 A.M. to inquire why the insurance policy had not come and talked with Mrs. Halverson to confirm her previous request to Mr. Kelly; that Mrs. Halverson said she would ask Kelly when he came in and in the meantime she would see that it was gotten right out, and took the information required for liability insurance required by the State law; that at the time she made the telephone calls on the morning of September 20th, 1952, she did not know that an accident had occurred, but was later notified by an unidentified lady whose call came ten or fifteen minutes after the conversation with Mrs. Halverson. (R. 35 to 37).

The appellant issued and delivered to appellee an automobile policy of insurance under and by which policy of insurance appellant insured appellee from

12:01 A.M. on September 20, 1952 to September 20, 1953. The policy was issued through appellant's agent, Bill Kelly Realty, authorized by appellant insurance company to make a binding contract of insurance.

In the complaint it is alleged that the policy of insurance was ordered from the Bill Kelly Realty on the 17th day of September, 1952 (R. 4). There never was in fact a written application made and signed by appellee or anyone acting for him. There was evidence to the effect that Jane Halverson, employee in the office of Bill Kelly Realty, prepared a memorandum of a telephone call on September 20, 1952 (R. 167) on a form usually used for insurance applications. Throughout the brief of appellant an attempt is made to lead this Court to believe that this was an application made and signed by appellee and the only order for the insurance. Appellant's contentions in this regard just are not supported by the evidence or the findings of the Court. The wife of appellee did telephone the Bill Kelly Realty on the morning of September 20, 1952, in order to learn why the insurance policy she had ordered on September 17, 1952, three days before, had not been received (R. 115). This is specifically referred to in the opinion of Judge Pray (R. 36).

The appellee who is the named insured was involved in an accident on the morning of September 20, 1952. He was rendered unconscious in the acci-

dent and taken to a hospital. Upon leaving the hospital in company with a Highway Patrol Officer he stopped at the Bill Kelly Realty to report the accident. He therefore reported the accident shortly before noon on September 20, 1952 and before the policy of insurance referred to in this action was delivered to appellee. The policy was forwarded to appellee in an envelope which was postmarked at 5:00 P.M. September 20, 1952 (R. 79; Ex. 7, R. 199).

On September 22, 1952, appellee paid the required premium for the policy (R. 200, Ex. 8).

Appellant's insurance adjuster, W. D. Hirst, began an investigation of the case either on September 22 or 23, 1952 (R. 137-138).

At no time has the appellant notified the appellee that the policy of insurance was void and of no force and effect.

The policy of insurance provides in Paragraph 22 of Conditions that the company may cancel the policy upon ten days notice to the insured. Under date of December 10, 1952, the General Agent of the appellant company, H. S. Dotson, forwarded to the appellee a Notice of Cancellation which states on its face that "Under the terms of" the policy, cancellation of the policy would become effective as of 12:01 A.M. December 21, 1952 (R. 15). Following the cancellation there was a partial refund of the premium that had been paid. The obvious question becomes, For what period was the earned premium retained?

The answer is that by this action the appellant fixed the insured period as commencing 12:01 A.M. September 20, 1952 and terminating 12:01 December 21, 1952. The Opinion of the Court dated May 26, 1956, answered the question in the same way and notes that the appellant fixed the term of the insurance contract. (R. 32-37).

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Following that decision of Judge Speer the attorneys for the appellee wrote to the appellant, Canadian Idemnity Company under date of October 30, 1953, (Appellee's Ex. 14, R. 207). Enclosed with that letter was a copy of Judge Speer's decision and we advised the company at that time that we believed that the company had waived its right to deny the contract of insurance on that date. (R. 207, Ex. 14). The response of the appellant insurance company was in

effect a further ratification of the contract of insurance (Appellee's Ex. 15, R. 210).

No attempt was ever made to refund the earned premium until after an action had been filed against appellee arising out of the accident that had occurred on September 20, 1952 and at that time the appellant made no attempt to refund the earned premium, but its counsel by letter dated June 11, 1954, addressed to counsel for appellee, enclosed its check payable to appellee for the earned premium(Appellee's Ex. 1, R. 195-196), **more than a year and a half** after the cancellation of the insurance policy. That purported tender of the earned premium was refused by appellee by letter addressed to the attorneys for appellant (Ex. 3. R. 197).

ARGUMENT

At the outset of appellant's argument in its brief inconsistent positions are adopted. First, a case is cited to contend that the insurance policy is void and then, as a comment on that case, counsel states:

"At least, that particular risk is not covered" (Br. 12).

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two wholly inconsistent theories in order to avoid its contractual liability.

The **first position** as we read appellant's brief, is that this Court should now at this late date permit the appellant to rescind its contract.

The **second position** is to the effect that appellant is contending that there was a contract of insurance in existence but that this Court should reform the contract.

To discuss these contentions we will first discuss appellant's **second position** as above set forth.

The contract which the Court has for consideration is a contract of insurance prepared by the appellant insurance company. It is and was effective at 12:01 A.M. on September 20, 1952. If this Court could change the effective hour of the policy, the Court can change the effective day of the policy or the effective month of the policy. The suggestion is that this Court re-write the contract or make it say something different than it does say.

If the appellant in this case thought it had a proper case for reformation of a contract, it had a long time and ample opportunity to bring such an action. No such action was ever instituted by the appellant and no such action is now before this Court for consideration. No such action was suggested when the matter was presented for consideration by the Honorable J. W. Speer, Judge of the State District Court, in the case entitled, Leo Tacke, appellant, vs. Glenn M.

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"* * * A copy of such notice must also be served upon all other parties in interest, if there be any, * * *".

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Judge Pray in his Opinion and Decision of May 26, 1956 (R. 32-37) covered this point. To quote in part from that Decision:

> "It appears that counsel for the defendant decided to tender a return of the premium June 11, 1954, which was 20 months after the policy had been issued, which was not accepted."
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> "The defendant could have promptly recinded the contract of insurance upon receipt of the report of its agent following an investigation of the accident which was begun two days after the accident occurred on September 22, 1952. There is no showing of reasonable diligence here either as to recission or cancellation of the contract. Recission must be made promptly upon discovering the facts if the one making the discovery "is free from duress, menace, undue influence, or disability, and is aware of his right to rescind", and furthermore everything received under the contract must be restored, all in accordance with section 13-905 (7565) R.C.M. 1947."

Appellant insurance company admits that it had notice that appellee was sued by Pearl Kissee (Ex. C of complaint, R. 15) on May 22, 1954. The evidence had shown that appellee, through his attorneys, notified the appellant, Canadian Indemnity Company, at the time the suit was filed and asked that the company defend Mr. Tacke under the terms of its policy. The company still declined to take any action, but did, only three days before a pleading was due in the

District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade in the Pearl Kissee case, try to tender a return of the premium (Ex. 1, R. 195), which tender was refused (Ex. 3, R. 197). This tender was made on June 11, 1954 by Attorney Hoffman with his own personal check and not with the check of appellant, Canadian indemnity Company (Ex. 3, R. 196). Mr. Hoffman testified that "I made the decision that that check should be issued" (R. 64). This previous lack of action is certainly more than an unreasonable delay—the first action by the company in deciding it should return the premium was on June 11, 1954 (for the policy effective September 20, 1952)—or one year and eight months later (R. 60; Ex. 1, R. 195).

There was no rescission of this contract but a cancellation as of December 21, 1952 within the terms of the contract. The statute of Montana governing rescission provides:

> **"Revised Codes of Montana, 1947,** 13-905 (7567) Rescission, when not effected by consent, can be accomplished only by the use on the part of the party rescinding, of reasonable diligence to comply with the following rules:
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> "1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,
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> "2. He must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do like-

wise, unless the latter is unable or positively refuses to do so."

Under the law of rescission the party, (appellant) must act **promptly** and must return **everything of value** he received. That is the statutory law of Montana as indicated above.

If the appellant thought the contract was issued on a fraudulent basis it did have an opportunity to rescind it in 1952. As stated by the Court in **Burnes vs. Burnes,** 137 Fed. 781, 800:

> "The law gives one who is induced by fraud to make a contract the option to rescind it. But it imposes upon him the duty to exercise that option with all convenient speed after his discovery of the fraud. He may not speculate upon it. He may not lie in wait until time and change make his interest plain, and then make his choice. Silence, delay, acquiescence, or the retention of the fruits of the agreement for any considerable length of time after the discovery of the fraud, constitutes a complete and irrevocable ratification of the transaction." Cases cited.

The action of the appellant in this case was clearly a ratification of the contract.

a. The accident was reported to the agent authorized to issue the policy before noon on September 20, 1952. The policy was thereafter mailed to Leo Tacke, the appellee. The postmark on the envelope (Ex. 7, R. 199) shows that the stamp was cancelled at 5:00 P.M. on September 20, 1952.

b. On September 22, 1952, a receipt for the insurance premium paid by the appellee was given (Appellee's Ex. 8, R. 200).

c. The insurance adjuster prior to October 27, 1952 advised the appellant that his investigation disclosed that the accident had occurred prior to the issuance of the insurance contract (R. 186).

d. On December 10, 1952, the appellant cancelled the insurance contract effective December 21, 1952 as of 12:01 A.M. That Notice of Cancellation (Ex. B attached to complaint, R. 15, and introduced in evidence as Ex. 9) was issued by the General Agent for the appellant in this case and it was issued "under the terms of automobile policy No. 22 CA 3908". That document in and of itself was a ratification and remains to this date a ratification of the insurance contract. The provisions of Paragraph numbered 22 of the contract of insurance (Ex. A attached to complaint, R. 12 and introduced in evidence as Ex. 6) were relied on by the appellant insurance company. Appellant retained the right in that provision of the policy to cancel it and it used that right to pro-rate the earned premium and returned the unearned portion of the premium that had been paid by the appellee. For what period of time did they compute the earned premium? The answer is obvious. From 12:01 A.M. September 20, 1952 to 12:01 A.M. December 21, 1952. This was done by the appellant company after its investigator, Mr. Hirst, had advised the company that his investigation disclosed that the accident had occurred prior to the issuance of the policy on September 20, 1952 (R. 186). That cancellation and

Statutes: Page

Texts:

No. 15704

IN THE

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellant,

vs.

LEO TACKE,

Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The Notice of Appeal in this case refers in the first instance to a final judgment entered on the 26th day of May, 1956 (R. 48). Actually the judgment was entered June 19, 1956 (R. 42). The Judgment by its terms incorporates the Findings of Fact and Conclusions of Law and the Opinion of the Honorable

Charles N. Pray, which Opinion was entered May 26, 1956 (R. 32-37).

The Opinion entered May 26, 1956 sets forth the issues in this case as determined by the Honorable Charles N. Pray, District Judge. The issues in that Opinion together with the Findings of Fact and Conclusions of Law both provide that the evidence preponderates in favor of the plaintiff, appellee here, and against the defendant, appellant here.

The appellant's brief does not set forth a complete statement of the case and we believe that it is proper to set forth a statement of the case in this brief.

This was an action brought under the declaratory judgment Act, 28 U.S.C.A. 2201, in the nature of an action for breach of contract.

While the date that the contract of insurance was ordered is not the basis upon which this case was decided by the District Court, yet throughout appellant's brief an attempt is made to lead this Court to believe that there was an application for insurance made on September 20, 1952. The only evidence in the case is that there was a telephone call on September 20, 1952 to determine why the insurance policy had not been received and this matter was considered by the District Judge and for clarification of that question we quote from the Opinion and Decision:

> "Mrs. Lenora A. Tacke, wife of the plaintiff, Leo Tacke, testified concerning three conversations over the telephone with Mr. Kelly or representatives of his office in connection with ordering the

policy of liability insurance, not including the conversations with the real estate salesman, the first conversation originated when Mr. Kelly telephoned and asked Mrs. Tacke to have Leo Tacke give him an estimate on some lawn work in the back of his rental property, at which time Mrs. Tacke told Mr. Kelly that in appreciation for giving them the lawn work they would take out insurance on the 1948 Chevrolet with him and Mr. Kelly said when they were ready it would be fine; that on September 17th, 1952, Mr. Kelly again telephoned and asked Mrs. Tacke to have her father use his tractor and equipment to clear weeds and rubbish off from a piece of property he had for sale that afternoon and on the occasion of that conservation Mrs. Tacke requested Mr. Kelly to be sure Leo is covered by insurance and Mr. Kelly thanked her; that the policy had not been received and on Saturday morning, September 20th, 1952, she phoned Mr. Kelly's office before 8:30 A.M. and the line was busy and called again a few minutes after 9:00 A.M. to inquire why the insurance policy had not come and talked with Mrs. Halverson to confirm her previous request to Mr. Kelly; that Mrs. Halverson said she would ask Kelly when he came in and in the meantime she would see that it was gotten right out, and took the information required for liability insurance required by the State law; that at the time she made the telephone calls on the morning of September 20th, 1952, she did not know that an accident had occurred, but was later notified by an unidentified lady whose call came ten or fifteen minutes after the conversation with Mrs. Halverson. (R. 35 to 37).

The appellant issued and delivered to appellee an automobile policy of insurance under and by which policy of insurance appellant insured appellee from

12:01 A.M. on September 20, 1952 to September 20, 1953. The policy was issued through appellant's agent, Bill Kelly Realty, authorized by appellant insurance company to make a binding contract of insurance.

In the complaint it is alleged that the policy of insurance was ordered from the Bill Kelly Realty on the 17th day of September, 1952 (R. 4). There never was in fact a written application made and signed by appellee or anyone acting for him. There was evidence to the effect that Jane Halverson, employee in the office of Bill Kelly Realty, prepared a memorandum of a telephone call on September 20, 1952 (R. 167) on a form usually used for insurance applications. Throughout the brief of appellant an attempt is made to lead this Court to believe that this was an application made and signed by appellee and the only order for the insurance. Appellant's contentions in this regard just are not supported by the evidence or the findings of the Court. The wife of appellee did telephone the Bill Kelly Realty on the morning of September 20, 1952, in order to learn why the insurance policy she had ordered on September 17, 1952, three days before, had not been received (R. 115). This is specifically referred to in the opinion of Judge Pray (R. 36).

The appellee who is the named insured was involved in an accident on the morning of September 20, 1952. He was rendered unconscious in the acci-

dent and taken to a hospital. Upon leaving the hospital in company with a Highway Patrol Officer he stopped at the Bill Kelly Realty to report the accident. He therefore reported the accident shortly before noon on September 20, 1952 and before the policy of insurance referred to in this action was delivered to appellee. The policy was forwarded to appellee in an envelope which was postmarked at 5:00 P.M. September 20, 1952 (R. 79; Ex. 7, R. 199).

On September 22, 1952, appellee paid the required premium for the policy (R. 200, Ex. 8).

Appellant's insurance adjuster, W. D. Hirst, began an investigation of the case either on September 22 or 23, 1952 (R. 137-138).

At no time has the appellant notified the appellee that the policy of insurance was void and of no force and effect.

The policy of insurance provides in Paragraph 22 of Conditions that the company may cancel the policy upon ten days notice to the insured. Under date of December 10, 1952, the General Agent of the appellant company, H. S. Dotson, forwarded to the appellee a Notice of Cancellation which states on its face that "Under the terms of" the policy, cancellation of the policy would become effective as of 12:01 A.M. December 21, 1952 (R. 15). Following the cancellation there was a partial refund of the premium that had been paid. The obvious question becomes, For what period was the earned premium retained?

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b. On September 22, 1952, a receipt for the insurance premium paid by the appellee was given (Appellee's Ex. 8, R. 200).

c. The insurance adjuster prior to October 27, 1952 advised the appellant that his investigation disclosed that the accident had occurred prior to the issuance of the insurance contract (R. 186).

d. On December 10, 1952, the appellant cancelled the insurance contract effective December 21, 1952 as of 12:01 A.M. That Notice of Cancellation (Ex. B attached to complaint, R. 15, and introduced in evidence as Ex. 9) was issued by the General Agent for the appellant in this case and it was issued "under the terms of automobile policy No. 22 CA 3908". That document in and of itself was a ratification and remains to this date a ratification of the insurance contract. The provisions of Paragraph numbered 22 of the contract of insurance (Ex. A attached to complaint, R. 12 and introduced in evidence as Ex. 6) were relied on by the appellant insurance company. Appellant retained the right in that provision of the policy to cancel it and it used that right to pro-rate the earned premium and returned the unearned portion of the premium that had been paid by the appellee. For what period of time did they compute the earned premium? The answer is obvious. From 12:01 A.M. September 20, 1952 to 12:01 A.M. December 21, 1952. This was done by the appellant company after its investigator, Mr. Hirst, had advised the company that his investigation disclosed that the accident had occurred prior to the issuance of the policy on September 20, 1952 (R. 186). That cancellation and

the retention of the earned premium can be construed only as a ratification of the contract of insurance.

We submit that this Court cannot in fairness and justice accept either of the suggestions made by the appellant's brief, that is, to re-write the contract and make it say something different than it does say, or relieve the appellant from the obligations of its contract on the law of rescission after repeated acts of ratification on the part of the appellant. There is no question of fraud in this case:

> "THE COURT: Well you haven't got any fraud in this case; it isn't set up in the pleadings, either way there is none here at all." (R. 193).

There is no question about the authority of the agent Bill Kelly Realty to issue a contract of insurance (Paragraph II of Complaint, R. 3 and Paragraph a of Answer, R. 28, and Findings of Fact and Conclusions of Law R. 38).

Those decisions cited by appellant in its brief dealing with the submitting of written applications subject to acceptance by an insurance company do not apply in this case. The cases cited by appellant do not apply to this factual situation. Furthermore most of those cases involve fire and other type policies with problems of insurable interest, good health, and other dissimilar situations having no bearing on this case. It is apparent that appellant is trying to lead the Court to believe that this is a case different than it really is. Appellant would lead this Court to believe that a personal memorandum made as the re-

sult of a telephone call was a written application (R. 167). However, even adopting appellant's view of the facts the doctrine of waiver and estoppel applies and the appellant cannot now avoid its contractual liability. This matter was considered by Judge Pray in his Opinion and Decision (R. 32-37 and R. 37).

> "Although this case presents a rather unusual situation in respect to the facts it does seem clearly to appear from a consideration of all the evidence that the defendant by its own acts is estopped from denying the validity of its contract of insurance, and the preponderance of the evidence appears to favor the plaintiff, and such is the decision of the court herein.****"

This case is quite similar to **Firemans' Insurance Co. of Newark, N.J. vs. Show,** et al., 110 F. Supp. 523, in that both cases involve insurance policies wherein the question of estoppel and waiver may be involved. The Court held in a declaratory judgment action by an automobile liability insurer for determination of rights under a policy which had been issued on condition that the vehicle covered was solely owned by the named insured, but transferred to the vehicle of which the insured was allegedly not sole owner, that the insurers were estopped from contending that the policy was void or that they relied on false and untrue statements and declarations made by the insured and another, by action of their agent who transferred the policy knowing that the insured had paid consideration for a vehicle but that the record of title and of purchase money mortgage would appear in the name of another.

Now in our case appellant still retains the premium for the policy issued to appellee and effective from September 20, 1952 at 12:01 A.M. until time of cancellation in conformity with the terms of the policy on December 21, 1952 at 12:01 A.M. By accepting the benefits of this contract and retaining these benefits in the form of a premium the appellant Canadian Indemnity Company has consented to all the obligations of the contract. See **Revised Codes of Montana,** 1947, as follows:

> "13-325 (7497) **Assumption of obligation by acceptance of benefits.** A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

Applying this section in **Beebe vs. James,** 8 P (2d) 803, 91 Mont. 403, our Montana Supreme Court held where a party having entered into a contract discovered he had been defrauded but still retained the land and used it as his own had waived the fraud and ratified the contract. In the Beebe case there was even a notice given that the contract would be rescinded because of the discovery of fraud, but the benefits were retained. In our present case there is no evidence of fraud, but rather a transaction made in good faith and a contract of insurance issued with an acceptance of the benefits by the appellant insurance company.

Our Montana Supreme Court has in **Cook-Reynolds Co. vs. Beyer,** 79 P. (2d) 658, 107 Mont. 1, held

that acquiescence may be implied from an unreasonable delay in applying for redress after getting notice of the mistake.

And in a recent case we find the rule stated as follows:

> "Forfeiture of an insurance policy is waived as a matter of law if, in negotiations or transactions with the insured after knowledge of facts permitting the forfeiture, the insurer recognizes the continued validity of the policy, or does acts based thereon."
>
> Seavey v. Erickson, 244 Minn. 232, 69 N.W. (2d) 889, 52 A.L.R. (2d) 1144.

In another Montana decision the court held:

> "***It has generally been held that, where the agent of the insurance company, at the time of issuing the policy, knows facts which by the terms of the policy render it void, **the insurance company by issuing the policy** and accepting the premium waives such provision in the policy, or, as some courts hold, **is estopped from asserting nonliability under such** circumstances." Cases cited.
>
> (Boldface ours)
>
> Krpan vs. Central Federal Ins. Co. 87 Mont. 345; 287 P. 217 at 218.

And as stated by the Court in the case of **C. E. Carnes & Co. v. Employers' Liability Assur. Corp.** 101 Fed. (2d) 739 at 742:

> "***The substance of the doctrine of waiver as applied in the law of insurance is that if the insurer with knowledge of facts which would bar an existing primary liability, recognizes such primary liability by treating the policy as in force, he will not thereafter be allowed to plead such facts to avoid his primary liability."

Answering further some of appellant's contentions, there is nothing illegal or wrong in entering into an insurance contract for protection against a loss which may already have occurred, nor is there anything illegal or wrong in issuing a policy and predating said policy.

> "No legal obstacle exists to prevent parties, if they so desire, from entering into contracts of insurance to protect against loss that may possibly have already occurred."
>
> United States of America vs. Patryas, 303 U.S. 341, 82 L. Ed. 883.

Also see **Hooper vs. Robinson,** 98 U. S. 528, 25 L. Ed. 219 (P. 220 2nd column L. Ed.)

> "One may become a party to an insurance (contract) effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have happened before the insurance was made."

Also:

> "If there is a binding contract of insurance, the fact that the policy is not delivered until after a loss occurred does not defeat insured's right to recover under the contract."
>
> El Dia Ins. Co. vs. Sinclair, 228 Fed. 833.

And further in **Blashfield's Cyclopedia of Automobile Law and Practice,** Vol. 6, Page 722, Sec. 3996), we find the following statement:

> "****An insurer may by contracting to do so assume liability for losses occurring before the date of the policy or before its execution and delivery."

The law generally is as follows:

"The time at which the risk under a policy of insurance commences and the period during which it continues and at the expiration of which it terminates are to be determined by reference to the terms of the contract."

44 C. J. S. page 1261.

"The time at which the risk commences under a policy of accident insurance is to be determined by reference to the terms of the contract.***"

44 C. J. S. page 1267.

The appellant is now estopped as a matter of law from claiming there was no effective contract of insurance. If there originally was any legal basis to rescind the contract there has been a **waiver** by issuing a policy and by acceptance of and retention of a premium for a fixed term and the appellant is now estopped from denying coverage under the valid contract.

Judge Pray said further in his Opinion and Decision (R. 32-37)

"It would seem that the defendant by accepting the entire premium on the policy for the full year and retaining it for the period of three months would be bound by the obligations assumed in the contract of insurance. While there was no fraud alleged here it has been held that where fraud was discovered by a party to a contract and he accepted the consideration therefor and applied the same to his own use, the fraud was waived. Any unreasonable delay in moving for redress where fraud or mistake is discovered by a party to a contract may be held to be consent or acceptance notwithstanding the fraud or mistake."

It must be remembered that the appellant fixed the three month period that the insurance policy was in force, to-wit: from 12:01 A.M. September 20, 1952 to 12:01 December 21, 1952. That is the finding of the trial court in its opinion and expressly set forth in Finding of Fact No. 5 (R. 39) and in the Judgment (R.41).

We respectfully submit that this Court should affirm the Opinion and Decision of the Honorable Charles N. Pray and the Findings of Fact, Conclusions of Law and Judgment entered in accordance therewith.

Respectfully submitted,

EMMETT C. ANGLAND,

WILLIAM L. BAILLIE,

Attorneys for Appellee

Mezzanine Floor
Ford Building
Great Falls, Montana

Service of the foregoing Appellee's Brief and receipt of three copies thereof is hereby admitted this ..... day of March, 1958.

H. B. HOFFMAN,
ORIN R. CURE,
Attorneys for Appellant
502 First Nat'l Bank Bldg.
Great Falls, Montana

No. 15704

United States
Court of Appeals
for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,
Appellant,

vs.

LEO TACKE,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Montana, Great Falls Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—12-18-57

No. 15704

United States
Court of Appeals
for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,
Appellant,

vs.

LEO TACKE,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Montana, Great Falls Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Plaintiff—Appellee:

WILLIAM L. BAILLIE,
First National Bank Building,

EMMETT C. ANGLAND,
Ford Building,
Great Falls, Montana.

For Defendant—Appellant:

HOFFMAN AND CURE,

First National Bank Building,
Great Falls, Montana.

In The United States District Court, for the District of Montana, Great Falls Division

Civil No. 1648

LEO TACKE, Plaintiff,

vs.

THE CANADIAN INDEMNITY COMPANY, Defendant.

COMPLAINT

Comes Now, the plaintiff above named and for his cause of action, against the defendant herein, complains and alleges:

I.

This Court has jurisdiction hereof by reason of the fact that plaintiff is now and at all times mentioned herein was a citizen and resident of the State of Montana, in the City of Great Falls, Montana, and the defendant is a stock Insurance Company, with its home office at Winnepeg, Canada, and its United States head office at Los Angeles, California, and it is now and was at all times herein mentioned authorized to do and doing business in the State of Montana, with its principal office in said state, in the City of Helena, Montana, and the amount involved in this action, exclusive of interest and costs exceeds the sum of $5,000.00.

II.

On September 20, 1952, and at all times mentioned herein, defendant designated Bill Kelly

Realty of Great Falls, Montana, as an authorized representative with power to execute a contract of insurance.

III.

That prior to September 17, 1952, plaintiff discussed with Bill Kelly of the Bill Kelly Realty in Great Falls, Montana, the fact that plaintiff had acquired a 1948 Chevrolet four door sedan which plaintiff was repairing and expected soon to have in running order, and plaintiff advised the said Bill Kelly that he would purchase an automobile liability policy from the Bill Kelly Realty when said automobile was in running order, and on the 17th day of September, 1952, through his wife, Lenora Tacke, ordered from the said Bill Kelly Realty an automobile liability policy of insurance for said 1948 Chevrolet automobile. On September 20, 1952, the defendant acting through its said agent, Bill Kelly Realty, issued to plaintiff an automobile policy of insurance under and by which policy of insurance defendant insured plaintiff from 12:01 A.M. on September 20, 1952 to September 20, 1953; that a copy of the policy of insurance issued to plaintiff is attached hereto, marked Exhibit "A" and by this reference made a part hereof.

IV.

Said policy of insurance was made, issued and delivered by defendant to plaintiff on the condition that plaintiff pay the total premium of $39.00, which said sum plaintiff did pay to the defendant on September 22, 1952.

V.

On September 20, 1952, and after the effective date of said policy of insurance, plaintiff while driving and operating the 1948 Chevrolet four door sedan automobile described in said policy of insurance was involved in a collision near the City of Great Falls, Montana, with a motor vehicle being operated by Ed Kissee. As a result of said collision the plaintiff and his son Richard Tacke who was riding with him as a passenger were injured and Ed Kissee and Pearl Kissee who were riding in the motor vehicle being operated by Ed Kissee were injured and the motor vehicle being operated by Ed Kissee was severely damaged.

VI.

On the 10th day of December, 1952, defendant through its General Agent, H. S. Dotson Company, in accordance with the terms of the automobile insurance policy delivered to plaintiff, issued its certain Notice of Cancellation effective as of 12:01 A.M. the 21st day of December, 1952, a copy of which Notice of Cancellation is attached hereto, marked Exhibit "B" and made a part hereof; and in accordance with the provisions of Paragraph numbered 22 of "Conditions" set forth in said policy, the defendant adjusted the premium paid by plaintiff on a pro rata basis and refund was made to plaintiff, the defendant retaining the pro rata charge for the period 12:01 A.M. September 20, 1952 to the effective date of cancellation, 12:01 A.M. December 21, 1952.

VII.

On the 22nd day of May, 1954, Pearl Kissee filed in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, a complaint against the plaintiff for damage alleged to have been suffered by the said Pearl Kissee in that certain automobile accident in which plaintiff was involved on the 20th day of September, 1952; plaintiff forwarded to defendant in accordance with the terms of the automobile insurance policy issued to plaintiff by defendant, the complaint and summons which were served on plaintiff on the 24th day of May, 1954; copy of said Complaint and Summons are attached hereto, marked Exhibit "C" and by this reference made a part hereof; and thereafter and on the 11th day of June, 1954, defendant through one of its attorneys, H. B. Hoffman, advised plaintiff that the defendant herein declined and refused to defend plaintiff in the case filed by Pearl Kissee in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, and the said H. B. Hoffman, Esquire, then tendered to plaintiff the premium which plaintiff had paid to defendant for the period of time that said automobile insurance policy was effective, to-wit: 12:01 A.M. September 20, 1952 to 12:01 A.M. December 21, 1952, and defendant by tendering the earned premium on June 11, 1954, and after an action had been filed against plaintiff seeks to void its contractual obligation; plaintiff refused the tender on the 12th day of June, 1954, and returned to H. B.

Hoffman, Esquire, check tendered by him for and on behalf of defendant.

VIII.

By said policy of insurance, Exhibit "A" hereto, it is provided under insuring agreement II:

"Defense, Settlement, Supplementary Payments. As respects the insurance afforded by the other terms of this policy under coverages A and B the company shall:

(a) Defend any Suit against the Insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(b) Pay All Premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds, required of the Insured in the event of accident or traffic law violation during the policy period, not to exceed the usual charges of surety companies nor $100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) Pay All Expenses incurred by the Company, all costs taxed against the Insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

(d) Pay Expenses Incurred by the Insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

(e) Reimburse the Insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy."

IX.

By reason of the defendant having refused and declined to represent plaintiff in the action filed by Pearl Kissee and by reason of the matters and things hereinbefore alleged the plaintiff herein will be subject to great peril and hazard if the plaintiff is required to defend the suit now pending as aforesaid against the plaintiff, and plaintiff is in great peril and damage of loss unless the policy of insurance herein referred to is properly construed and the rights of the parties determined in this action.

X.

In addition to the foregoing provision said policy of insurance prevents plaintiff from negotiating to settle the action pending against him in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade hereinbefore referred to; said policy of insurance provides that should plaintiff negotiate and settle said action for a reasonable amount he would be

prevented from then filing an action against the defendant for the amount of the settlement. Paragraph numbered 6 of "Conditions" set out in the policy provides in part as follows:

"Action Against Company.—Coverages A and B. No action shall lie against the company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by the written agreement of the Insured, the claimant and the company;"

XI.

By reason of defendant's denial of liability under said policy of insurance Glenn M. Schultz, Supervisor, Safety Responsibility Division, Montana Highway Patrol, Helena, Montana, forwarded to plaintiff a Notice of Security Requirement or Order of Suspension dated April 28, 1953, copy of which is attached hereto as Exhibit "D." To protect his right to his driver's license, it was necessary for plaintiff's attorneys to protest the issuance of the Notice of Security Requirement or Order of Suspension. This protest was unsuccessful and the Montana Highway Patrol by letter dated June 1, 1953, copy of which is attached hereto as Exhibit "E," among other things, advised plaintiff's attorneys that the defendant had advised the Montana Highway Patrol that plaintiff was not covered by insurance at the time of the accident that

occurred on September 20, 1952. Plaintiff appealed the said Order of Suspension dated April 28, 1953 and the letter decision of June 1, 1953 to the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade. By order duly given, made and entered on June 11, 1953 the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade stayed until further Order the Order of Suspension dated April 28, 1953 directed against plaintiff. By Order dated June 29, 1953, a hearing on plaintiff's appeal was set for July 30, 1953 and the Clerk of said Court was ordered to so notify appellant, the Supervisor of the Montana Highway Patrol and H. S. Dotson, General Agent for defendant. Notices of the date of hearing were issued by said Clerk of Court on June 29, 1953.

On July 30, 1953 the appeal came on for hearing and after being fully advised in the premises the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade duly gave, made and entered its order and decision by which the Court set aside the Order of Suspension issued by Glenn M. Schultz, Supervisor of the Montana Highway Patrol under date of April 28, 1953, and by which order the Court determined that the said Order of Suspension issued by the Supervisor of the Montana Highway Patrol was not issued in accordance with either the facts or the law applicable thereto and determined that on September 20, 1952, the plaintiff

herein had in effect an automobile liability insurance policy valid on its face and referred specifically to the policy of insurance which the defendant issued to the plaintiff and upon which this action is based. Copy of said Order dated July 30, 1953, duly given, made and entered by Hon. J. W. Speer, one of the Judges of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade is attached hereto marked Exhibit "F." The Canadian Indemnity Company was fully informed at all times of this proceeding by service of proper documents on the General Agent of the Company.

XII.

Because of defendant's failure and refusal to assume its responsibility under the contract of insurance with plaintiff it was necessary for plaintiff to employ attorneys to investigate the accident and to furnish professional services in connection with the accident, and to appeal the Order of Suspension of the Montana Highway Patrol and to furnish professional services to determine the validity of the insurance policy as well as bring this action all through the fault of defendant. That the reasonable value of said attorneys' services is Three Thousand Dollars ($3,000.00).

Wherefore, Plaintiff prays judgment as follows:

1. That this Court determine, declare and adjudicate the validity of the policy of insurance herein set forth and the liability of the defendant

thereunder, and that as plaintiff contends herein, be found to be proper that this Court declare that said policy was and is a valid contract of insurance as of 12:01 A.M. September 20, 1952, and that the defendant is liable and obligated in accordance with the terms of said policy of insurance issued to plaintiff.

2. That this Court award to plaintiff reasonable attorneys' fees in the sum of Three Thousand Dollars ($3,000.00) and for plaintiff's costs and disbursements herein incurred.

3. For such other and further relief as to the Court may seem meet and just.

/s/ WILLIAM L. BAILLIE,
/s/ EMMETT C. ANGLAND,
Attorneys for Plaintiff.

EXHIBIT "A"

COMBINED AUTOMOBILE POLICY

The Canadian Fire Insurance Company
The Canadian Indemnity Company
United States Head Office, Los Angeles, Calif.

Home Office: Winnepeg, Canada.

DECLARATIONS

1. Name of Insured: Leo Tacke.

Address: 124—20th St. S.W., Great Falls, Montana.

Policy Number: 22 CA 3908.

Agent: Bill Kelly Realty.

Address: Great Falls, Montana.

2. Policy period: From September 20, 1952 to September 20, 1953. (12:01 A.M. Standard time at the address of the named insured as stated herein.)

The automobile will be principally garaged in the above Town, County and State, unless otherwise specified herein:

The occupation of the named insured is: Body Man for International Harvesters.

Employer's name:

3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by a specific premium charge or charges set opposite thereto. The limit of the Company's liability against each such coverage shall be as stated herein, subject to all of the terms of the policy having reference thereto.

Coverages

Coverage A. Bodily Injury Liability—Limits of Liability: $10,000.00 Each person, $20,000 Each accident. Premiums: $24.00.

Coverage B. Property Damage Liability—Limits of Liability: $5,000.00 Each accident. Premiums: $11.00.

Coverage C. Medical Payments—Limits of Liability: $500.00 Each person. Premiums: $4.00.

Other coverage per endorsement attached hereto: * * * * *

Premium: $39.00.

Total Premium: $39.00

4. Description of the Automobile and the facts respecting its purchase by Named Insured:

Year Model: 1948. Trade Name: Chevrolet. Type of Body (Load Capacity if truck: Seating Capacity if Bus): 4 dr. sedan.

* * * * *

5. If mortgaged, or encumbered, loss if any, under Coverages D, E, F, G, H and I payable as interest may appear, to the Named Insured and: no exception.

6. The purposes for which the automobile is to be used are: Pleasure and business.

Use of the automobile for the purposes stated includes the loading and unloading thereof.

7. No automobile insurance has been canceled by any company during the past year except as herein stated: no exception.

8. The Named Insured is the sole owner of the automobile except as herein stated: no exception.

Countersigned September 20, 1952.

BILL KELLY REALTY,

/s/ By J. C. HALVERSON,

(Authorized Representative.)

These Declarations, Together With Company Policy Form 102, Complete The Above Numbered Policy.

* * * * *

EXHIBIT "B"

The Canadian Fire Insurance Company

The Canadian Indemnity Company

Los Angeles Branch Office: 208 West 8th St., Zone 14. Phone MAdison 1126.

San Francisco Branch Office: 21 Sutter St., Zone 4. Phone DOuglas 6866.

NOTICE OF CANCELLATION

Mr. Leo Tacke.
P. O. Address 124—20th St. S.W. December 10th, 1952, Great Falls Montana.

Dear Sir:

Under the terms of Automobile Policy No. 22CA 3908 the Companies give you notice of their desire to cancel and do hereby cancel the said policy, including any and all endorsements or certificates attached thereto, cancellation to become effective as of 12:01 A.M. of the 21st day of December, 1952, standard time.

Please return cancelled policy as soon as possible.

Countersigned by
H. S. DOTSON CO.,
General Agent,
/s/ By A. W. BACON,
Agent.

EXHIBIT "C"

In The District Court of the Eighth Judicial District of the State of Montana, In and For The County of Cascade

PEARL KISSEE, Plaintiff,

vs.

LEO TACKE, Defendant.

SUMMONS

The State of Montana Sends Greetings to the Above Named Defendants, and to Each of Them:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon one of you in each County wherein any of you reside, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this Summons, exclusive of the day of service, and in case of your failure to appear or answer, Judgment will be taken against you, by default, for the relief demanded in the complaint.

Witness my hand and the Seal of said Court this 22nd day of May, 1954.

[Seal] AGNES SCHRAPPS,
Clerk.

By ELEANOR McKENZIE,
Deputy Clerk.

In The District Court of the Eighth Judicial District of the State of Montana, in and For The County of Cascade

PEARL KISSEE, Plaintiff,

vs.

LEO TACKE, Defendant.

COMPLAINT

Comes Now, the Plaintiff and for her cause of action against the Defendant, complains and alleges as follows, to-wit:

I

That Defendant herein was at all times herein mentioned the owner and operator of a motor vehicle known as a 1948 Chevrolet sedan, hereinafter referred to as "Chevrolet";

II.

That on or about the 20th day of September, 1952, at approximately the hour of 8:30 A.M., Plaintiff was a passenger riding in the front seat of a 1946 GMAC pickup truck which was being driven and operated in a westerly direction on a County road known as the Old Sun River Bridge Road in Cascade County, Montana, by her husband, Ed Kissee;

III.

That at the same time and place, Defendant was proceeding in said Chevrolet in a southerly direction on a County Road known as the Gore Field Road approaching the intersection of the said Old Sun River Bridge Road and Gore Field Road, all in Cascade County, Montana;

IV.

That a stop sign had been duly and regularly installed at the northwest corner of the intersection of the aforementioned County roads; that said stop sign faced towards the southbound traffic on said Gore Field Road and directed and required all vehicles travelling said Gore Field Road in a southerly direction to come to a complete stop before entering the aforementioned intersection;

V.

That the Defendant so unlawfully, negligently and carelessly drove and operated said Chevrolet as to bring said Chevrolet into violent contact and collision with said GMAC pickup truck causing the injuries to the Plaintiff hereinafter set forth;

VI.

That at the time of said collision and immediately prior thereto, the Defendant was negligent and careless in the following particulars:

1. In failing to obey the stop sign signal and without regard for the right of the driver of the said GMAC pickup truck to drive the same into the intersection, proceeding to drive said Chevrolet into said intersection without stopping and colliding into said GMAC pickup truck, thereby causing the collision as aforesaid;

2. In failing to keep a proper look out for other vehicles on the aforementioned roads and particularly the vehicle in which Plaintiff was riding;

3. In failing to keep his automobile in proper control;

4. In operating his said Chevrolet without due caution or circumspection and in utter disregard of the rights of others and particularly of the rights of Plaintiff;

5. In driving his said Chevrolet in such a manner as to cause it to collide with the right side of the vehicle in which plaintiff was riding;

That each and all of said accident negligence

was and were a direct and proximate cause of the collision and the injuries to the Plaintiff;

VII.

That as a direct and proximate result of the use and operation of the said Chevrolet aforesaid, and of said collision, the Plaintiff sustained the following injuries to her person:

> Bruises on the left forehead, chest, right wrist, and severe and painful shock to the entire nervous system.

all of which injuries have caused Plaintiff great pain, soreness and general shock and because of said injuries and their effects, the Plaintiff has been unable to perform properly her usual duties as a housewife, has suffered great mental anguish and has been hurt in her health, strength and activities, all to the damage of the Plaintiff in the sum of $5,000.00;

VIII.

That in the reasonable treatment of the hereinabove described injuries, it was necessary for the Plaintiff to secure the services of skilled physicians, nurses and housekeeper and to be hospitalized; that at the date hereof, Plaintiff has incurred obligations as follows for the services rendered by the aforesaid persons and for such hospitalization: physician, $55.00; Hospitalization, $86.45; and housekeeper, $64.00;

That the sums set out above are the reasonable cost and value of services rendered by the persons

who performed and rendered the same and of said hospitalization;

Wherefore, Plaintiff prays judgment against the Defendant in the sum of $205.45 for special damages and in the sum of $5,000.00 general damages and for her costs of suit herein incurred and for such other and further relief as to the Court may seem proper.

Dated this 20th day of May, 1954, at Great Falls, Montana.

JAMES & SCOTT,
By TED JAMES,
Attorneys for Plaintiff.

Duly Verified.

EXHIBIT "D"

Montana Highway Patrol
Safety Responsibility Division
Helena, Montana
April 28, 1953

NOTICE OF SECURITY REQUIREMENT OR ORDER OF SUSPENSION

Case Number 6264.

Date of Accident Sept. 20, 1952.

Location of Accident West Great Falls, Montana.

Operator's License No.....

Suspension Order becomes effective June 15, 1953 (if Security Requirements are not met).

Leo Tacke
124 20th St., S.W.
Great Falls, Montana

Report of your above described accident indicates that you did not have liability insurance for bodily injury and property damage in effect at the time of the accident. The Laws of 1951, Chapter 204, and known as the Safety Responsibility Law provides that the Supervisor must enforce suspension of your driving and registration licenses unless he has received satisfactory evidence that you have:

1. Been released from liability; or

2. Been adjudicated not to be liable; or

3. Executed a duly acknowledged written agreement providing for the payment of all claims, not exceeding $11,000.00 resulting from the accident; or

4. Deposited with the State Treasurer security, in the form of a surety bond from a duly authorized company, or a property bond or cash, in an amount sufficient to pay such claims, as determined by the Supervisor, up to $11,000.00.

Unless you satisfy the security requirements listed above you must submit to this Division $946.19 (946.19) (Amount of Security Required in Your Case), to be deposited with the State Treasurer, Helena, Montana, on or before the date the following Order of Suspension becomes effective. Personal Checks Are Not Accepted by the State Treasurer.

ORDER OF SUSPENSION

It is Hereby Ordered that your driving privilege and all operators licenses evidencing such privilege is suspended as of the date This Order Is Effective (as shown above) and all such licenses must be surrendered to the Safety Responsibility Division, Montana Highway Patrol, Helena, Montana.

This suspension will remain in effect until one (1) year has elapsed, following the date of such suspension, providing no court action has been instituted for damages, or until evidence satisfactory to the Safety Responsibility Division has been filed with it indicating that the requirements of the Safety Responsibility Law have been met.

This action is taken under the authority of Chapter 204, Laws of 1951.
Dated Signed April 28, 1953.

We have been advised by the Canadian Indemnity Company that you were not covered by liability insurance at the time of this accident.

GLENN M. SCHULTZ,
Supervisor.

The above Order for the deposit of Security is based on procedure as specified by the Safety Responsibility Law, and does not in any way fix the blame of any of the parties involved in the accident.

Form SR-8

EXHIBIT "E"

State of Montana
Montana Highway Patrol
Helena, Montana
June 1, 1953

Case No. 6264
Leo Tacke

Mr. Emmett C. Angland
Attorney at Law
521 Ford Building
Great Falls, Montana

Dear Sir:

The Canadian Indemnity Company has advised this office that Mr. Tacke was not covered by insurance at the time of the accident that occurred September 20, 1952.

Their investigation disclosed that the policy was not taken out until after the accident.

It will be necessary for Mr. Tacke to meet one of the other provisions of the Montana Motor Vehicle Safety Responsibility Law.

Yours very truly,

/s/ GLENN M. SCHULTZ,
Glenn M. Schultz,
Supervisor,
Montana Highway Patrol.

gms/a

EXHIBIT "F"

[Title of District Court and Cause No. 39270.]

ORDER

This matter came on regularly for hearing before the Court on the 30th day of July, 1953, in accordance with the Order of the Court fixing said date for the hearing of the appeal herein. The appellant appeared in person and by his counsel William L. Baillie and Emmett C. Angland, and Glenn M. Schultz, Supervisor of the Montana Highway Patrol, appeared in person, and there was no appearance by the Canadian Indemnity Company, a party in interest served with Notice of Appeal herein and with the Order fixing the day of hearing herein.

The Court examined the Notice of Appeal, the matters certified to the Court by the Supervisor of the Montana Highway Patrol and examined Policy No. 22 CA 3908 issued by the Canadian Indemnity Company, which policy appears valid on its face and became effective at 12:01 A.M. September 20, 1952, and the Court being fully advised in the premises, and for good cause finds that the Order of Suspension issued by the Supervisor of the Montana Highway Patrol, under date of April 28, 1953, was not issued in accordance with either the facts or the law applicable thereto, and further finds that the appellant at the time of the accident referred to in the Order of Suspension, to wit: September 20, 1952, had in effect an automobile liability policy valid on its face;

Now, Therefore, It Is Hereby Ordered that the

Order of Suspension issued by Glenn M. Schultz, Supervisor of the Montana Highway Patrol under date of April 28, 1953, be, and the same is hereby set aside.

Dated this 30th day of July, 1953.

/s/ J. W. SPEER,
Judge.

[Endorsed]: Filed Nov. 8, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS OR MAKE MORE CERTAIN

Defendant, The Canadian Indemnity Company, moves the Court as follows:

I.

To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

II.

Or, if the motion to dismiss be denied, that the plaintiff be required to make a more definite statement showing:

a) The name of the person that Lenora Tacke "ordered" the Liability Policy of Insurance from on September 17th, 1952, as alleged in the complaint, page 2, paragraph III, line 11; also the place and manner of such "order" and persons present. None of these facts are shown.

b) The hour of the day on September 20th,

1952, that plaintiff was involved in the collision near the City of Great Falls, referred to page 2, line 31, of the complaint. This fact is not shown in the complaint.

c) Whether Lenora Tacke did not call at the office of Bill Kelly Realty on September 20th, 1952, after the accident, and request that the policy of insurance referred to be issued. This fact is not shown in the complaint.

d) When the policy of insurance was received by the plaintiff, and how, and when, it was executed and issued. The complaint does not show the fact in this respect or whether the policy was issued or delivered before or after the accident.

This motion is made under Federal Rule 12 of Civil Procedure, (b) (e) and (g).

HOFFMAN & CURE,
/s/ By H. B. HOFFMAN,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 30, 1954.

[Title of District Court and Cause.]

ORDER

The motions of the defendant in the above entitled cause are before the court on briefs filed by counsel for the respective parties; in paragraph I of the motion defendant moves the dismissal of the action on the ground that the complaint fails to

state a claim against the defendant upon which relief can be granted; and in paragraph II, that if the motion above is denied that plaintiff be required to make a more definite statement as indicated by the several proposals noted as a, b, c and d.

The court has considered the complaint, motions and briefs of counsel, and being duly advised, and good cause appearing therefor, is now of the opinion that the plaintiff should not be summarily dismissed but should be accorded his day in court and allowed to present his proof under the allegations of the complaint, and that defendant should be required to file its answer to the complaint and submit its proof thereunder.

This case presents a situation very much in point with substantial authority; the court having specially in mind the well-known decision of Judge Sanborn of the Eighth Circuit Court of Appeals in Leimer v. State Mutual Life Assurance Co., 108 Fed. (2) 302.

The court believes the allegations of the complaint are sufficiently explicit and informative; if further information is desired the rules of discovery are available. Consequently, in view of the foregoing, the motions under paragraphs I and II are overruled with 20 days to answer upon receipt of notice hereof.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed March 19, 1955.

[Title of District Court and Cause.]

ANSWER

For its answer to plaintiff's complaint filed herein, defendant denies each and every allegation, matter, fact and thing in said complaint contained, save and except:

a) Admits the allegations of paragraphs I, II, VIII, and that the policy of insurance contained the clause set out in paragraph X thereof.

b) Admits that the policy referred to in paragraph III, of which Exhibit "A" attached to plaintiff's complaint is a copy, issued September 20th, 1952, out of the office of Bill Kelly Realty, and alleges in respect thereto that the written application for said policy was made and accepted at the hour of 9:30 A.M. September 20th, 1952, at which time Bill Kelly Realty agreed to, and subsequently on that day did issue the said policy; that the automobile accident referred to in the plaintiff's complaint had occurred about the hour of 8:20 A.M. that day and application for said policy was made by the plaintiff, acting through his wife, Lenora Tacke, at a time when the plaintiff knew that said accident had occurred, and said application was accepted and the promise to issue said policy was made without disclosure of that fact to Bill Kelly Realty and without knowledge on the part of said agency or on the part of the defendant that the accident and consequent loss or damage had already occurred when the promise to issue the policy upon said application was made.

c) Admits the premium on said policy was $39.00, which the plaintiff advanced to the defendant.

d) Admits that on or about December 10th, 1952, H. S. Dotson Co. issued the notice of cancellation referred to in paragraph VI of the complaint, and alleges in respect thereof that said notice was given to the plaintiff under the belief that the policy of insurance covered any and all losses that might have occurred between the time of the acceptance of the application for said policy September 20th, 1952, at 9:30 A.M. and the date designated for cancellation, and alleges in respect thereof that the defendant notified the plaintiff prior thereto that the policy of insurance did not cover the loss referred to in plaintiff's complaint, and which occurred about 8:20 A.M. the morning of September 20th, 1952.

e) Admits that defendant had notice of the filing of a complaint against the plaintiff referred to in paragraph VII of said complaint, and that the defendant declined and refused to defend said suit on behalf of the plaintiff and that the defendant then tendered to the plaintiff the entire premium upon said policy, and defendant alleges that at said time defendant gave notice to the plaintiff that its reason for refusal to defend said suit was that the plaintiff had knowledge of the loss referred to in his complaint at the time application for said policy was made and that he concealed such fact, by virtue whereof the policy had no binding force or

effect as coverage for the accident that had previously occurred.

f) Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph IX thereof.

g) Admits that defendant had knowledge of the acts and procedures referred to in paragraph XI of the complaint, but especially denies that the action of the District Court for Cascade County was an adjudication of the validity of the policy of insurance referred to, or that there was any judicial determination to that effect, as alleged by the plaintiff.

Further Answering Said Complaint, and as an Affirmative Defense Thereto, the Defendant Alleges:

I.

That the application for the insurance policy referred to in plaintiff's complaint was made to the Bill Kelly Realty, the agent of the defendant, upon the 20th day of September, 1952, at the hour of 9:30 A.M.; that said Bill Kelly Realty then and there accepted said application and agreed to issue the policy of insurance referred to in plaintiff's complaint.

II.

That at the time said application so made was accepted, neither the defendant nor said Bill Kelly Realty knew that the accident referred to in plaintiff's complaint had already occurred; that said ac-

cident actually had occurred at approximately 8:20 A.M. of September 20th, 1952.

III.

That said application for said policy upon September 20th, 1952, was made by the plaintiff's wife, Lenora Tacke, and at the time she made said application for insurance, the plaintiff knew that the collision referred to in the plaintiff's complaint had already occurred and the losses and damages caused thereby had been sustained.

IV.

That the fact that said accident had occurred and said damages and losses had been sustained was, in fact, concealed from said Bill Kelly Realty and the defendant until after the Bill Kelly Realty had accepted the application and agreed to issue the policy.

V.

That upon October 27th, 1952, the defendant, by its agent thereunto duly authorized, gave notice to the plaintiff that his policy of insurance was not in effect at the time the said loss occurred.

Wherefore, having fully answered, defendant prays that the plaintiff take nothing herein and that defendant may be dismissed hence with its costs.

HOFFMAN & CURE,

/s/ By H. B. HOFFMAN,

Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 11, 1955.

[Title of District Court and Cause.]

OPINION

The objective sought in the above entitled action by plaintiff is a declaratory judgment determining the validity of a policy of automobile insurance issued by the defendant through its agent covering an automobile that was involved in an accident which is alleged to have occurred before the policy was written. The said policy of insurance was written to become effective at 12:01 A.M. September 20, 1952, and the defendant claims the accident in which the aforesaid automobile was damaged occurred several hours before the policy of insurance was issued, and from the evidence it appears that the issuing agent knew the accident had occurred at the time the policy was delivered to plaintiff who paid the premium in full for one year, which was accepted by defendant's agent. The policy was dated to become in force several hours before the accident occurred, which is fixed by the evidence at about 8:20 A.M. or 8:40 A.M. on September 20, 1952.

On December 10th, 1952, notice of cancellation was given by defendant, in compliance with the terms of the policy for its cancellation, to become effective December 21, 1952. On cancellation of the policy the defendant retained the premium on the policy for the three months' period the policy was in force, to wit: from 12:01 A.M. September 20th, 1952 to December 21, 1952. The plaintiff was the owner of, and driving, the automobile involved in the accident of September 20th, 1952, and the Mon-

tana Highway Patrol, being advised by defendant that plaintiff had no valid automobile liability insurance policy in its company, issued an order of suspension under the Montana Statute.

Plaintiff took an appeal from the order of the said Highway Patrol to the State District Court of Cascade County, which was heard and decided by Honorable James W. Speer, Judge of said Court, who held that the plaintiff, Leo Tacke, was insured at the time of the accident aforesaid.

The defendant, having told the Highway Patrol that plaintiff had no liability insurance, was duly notified to appear before Judge Speer at the hearing on the validity of the insurance policy issued by the defendant company, but the defendant did not appear at the hearing and Judge Speer held that the plaintiff had an automobile liability insurance policy valid on its face.

Following the decision of Judge Speer the plaintiff through his counsel notified the defendant of the decision on the validity of the policy and requested the defendant to perform the provisions of the contract in actions brought against him arising out of the accident aforesaid, and the defendant failed to defend plaintiff against these actions as provided in the insurance policy.

It appears that shortly before appearance of defendant would have been due in the State Court in June 1954 counsel for the defendant with his personal check tried to refund the earned premium for the period fixed by the defendant in the insurance policy from 12:01 A.M. September 20, to 12:01

A.M. December 21st, 1952, the date of cancellation, but the refund was returned.

It would seem that the defendant by accepting the entire premium on the policy for the full year and retaining it for the period of three months would be bound by the obligations assumed in the contract of insurance. While there was no fraud alleged here it has been held that where fraud was discovered by a party to a contract and he accepted the consideration therefor and applied the same to his own use, the fraud was waived. Any unreasonable delay in moving for redress where fraud or mistake is discovered by a party to a contract may be held to be consent or acceptance notwithstanding the fraud or mistake.

Leo Tacke, the plaintiff, and his wife both testified to conversations with Mr. Kelly of the realty company, about taking out insurance with him on this same automobile that was later engaged in the accident aforesaid; while Mr. Kelly either denies or says he does not remember any such conversations, he does recall the meetings with Mr. and Mrs. Tacke as testified to by them; if these conversations were true, then that would perhaps account to some extent for Mr. Tacke making a timely report to him of the accident and for his willingness to issue the policy in question for 12:01 A.M. September 20th, 1952, although his secretary said she told Mr. Kelly at the time of her suspicion that an accident had already occurred.

It appears that counsel for the defendant decided to tender a return of the premium June 11, 1954,

which was 20 months after the policy had been issued, which was not accepted.

The defendant could have promptly rescinded the contract of insurance upon receipt of the report of its agent following an investigation of the accident which was begun two days after the accident occurred on September 22, 1952. There is no showing of reasonable diligence here either as to recission or cancellation of the contract. Recission must be made promptly upon discovering the facts if the one making the discovery "is free from duress, menace, undue influence, or disability, and is aware of his right to rescind", and furthermore everything received under the contract must be restored, all in accordance with section 13-905 (7565) R.C.M. 1947.

Counsel state in the brief that: "The policy in this case was delivered by mail after the insurance company through its agent, Bill Kelly Realty, knew full well that by delivering the policy the company was assuming a liability for an event that occurred before delivery of the policy. There is neither public policy nor law to prevent the assuming of a liability in this matter. The statute of frauds does require a writing. The provisions of the statute of frauds are complied with in this case. There is a written contract." Citing Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 6, Sec. 3923, P. 587, 591, and 44 C.J.S. 1261, 1267.

Mrs. Lenora A. Tacke, wife of the plaintiff, Leo Tacke, testified concerning three conversations over the telephone with Mr. Kelly or representatives of

his office in connection with ordering the policy of liability insurance, not including the conversations with the real estate salesman, the first conversation originated when Mr. Kelly telephoned and asked Mrs. Tacke to have Leo Tacke give him an estimate on some lawn work in the back of his rental property, at which time Mrs. Tacke told Mr. Kelly that in appreciation for giving them the lawn work they would take out insurance on the 1948 Chevrolet with him and Mr. Kelly said when they were ready it would be fine; that on September 17th, 1952, Mr. Kelly again telephoned and asked Mrs. Tacke to have her father use his tractor and equipment to clear weeds and rubbish off from a piece of property he had for sale that afternoon and on the occasion of that conversation Mrs. Tacke requested Mr. Kelly to be sure Leo is covered by insurance and Mr. Kelly thanked her; that the policy had not been received and on Saturday morning, September 20th, 1952, she phoned Mr. Kelly's office before 8:30 A.M. and the line was busy and called again a few minutes after 9:00 A.M. to inquire why the insurance policy had not come and talked with Mrs. Halverson to confirm her previous request to Mr. Kelly; that Mrs. Halverson said she would ask Kelly when he came in and in the meantime she would see that it was gotten right out, and took the information required for liability insurance required by the State law; that at the time she made the telephone calls on the morning of September 20th, 1952, she did not know that an accident had occurred, but was later notified by an unidentified

lady whose call came ten or fifteen minutes after the conversation with Mrs. Halverson.

Although this case presents a rather unusual situation in respect to the facts it does seem clearly to appear from a consideration of all the evidence that the defendant by its own acts is estopped from denying the validity of its contract of insurance, and the preponderance of the evidence appears to favor the plaintiff, and such is the decision of the court herein. On the subject of attorney's fees, from the arguments of counsel and authorities cited on both sides, and legal services rendered which were made necessary by reason of the refusal or failure of defendant to act in a timely manner or at all the court will fix the attorney's fees at fifteen hundred dollars, being a reasonable sum for the legal services of counsel as aforesaid, and such is the order and decision of the court herein. Exceptions allowed counsel.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed May 26, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried to the Court without a jury and the Court having considered the Briefs submitted by counsel and upon consideration of the

pleadings, records and the competent evidence herein and being fully advised, found issues of law and fact in favor of plaintiff and against the defendant as more fully appears in the Opinion of the Court heretofore filed herein on the 26th day of May, 1956. In accordance with said Opinion, the Court now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

The Court finds that:

1. This Court has jurisdiction hereof on the ground of diversity of citizenship and on the ground that the amount involved in the controversy, exclusive of interest and costs, was and is in excess of $3,000.00.

2. The Bill Kelly Realty of Great Falls, Montana, was on the 20th day of September, 1952, an authorized representative of the defendant, with power to execute a contract of insurance.

3. The defendant issued to the plaintiff, a contract or policy of insurance, being an automobile policy, Policy Number 22 CA 3908 and plaintiff paid to the defendant, the premium for said insurance.

4. The defendant issued and delivered said policy of insurance to the plaintiff, effective 12:01 A.M., September 20, 1952, and for the term of one year and thereafter the defendant cancelled said policy of insurance in accordance with the terms of said

policy, and said cancellation became effective at 12:01 A.M., on the 21st day of December, 1952.

5. The policy of insurance referred to herein was and is a valid contract of insurance binding upon the defendant for the period for which the defendant retained the earned premium, that is, from 12:01 A.M., on September 20, 1952, to 12:01 A.M., December 21, 1952, and the defendant is liable and obligated in accordance with the terms of said policy of insurance for the insured period fixed by the defendant, 12:01 A.M., September 20, 1952 to 12:01 A.M., December 21, 1952.

6. The defendant failed and refused to assume its responsibility under and by virtue of the terms of the policy of insurance and it was necessary for plaintiff to employ attorneys to represent him in investigating the accident in which plaintiff was involved and wherein Pearl Kissee was injured, for which injuries she filed an action against the plaintiff, entitled Pearl Kissee vs. Leo Tacke, filed in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, and said attorneys were employed to furnish professional services to the plaintiff in connection with the said action and said accident and the plaintiff further was required to employ said attorneys to appeal the order of suspension of driver's license issued by the Montana Highway Patrol to the plaintiff and for other purposes, by reason of the failure and refusal of the defendant to comply with the terms of said policy of insurance.

7 The evidence preponderates in favor of the plaintiff and against the defendant.

8. A reasonable sum for the legal services of counsel employed by the plaintiff by reason of the failure and refusal of the defendant to comply with the terms of the said policy of insurance as hereinbefore referred to is the sum of $1,500.00.

From the foregoing facts the Court draws the following:

Conclusions of Law

1. The Court has jurisdiction of the parties and subject matters herein.

2. That the contract of insurance, being Policy No. 22 Ca 3908, was and is a valid contract of insurance, from 12:01 A.M., September 20, 1952 to 12:01 A.M. December 21, 1952.

3. That plaintiff have and recover from the defendant reasonable attorneys' fees in the sum of $1,500.00 together with plaintiff's costs necessarily incurred herein.

Let Judgment be entered accordingly.

Dated this 19th day of June, 1956.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 19, 1956.

In the United States District Court for the District of Montana, Great Falls Division

Civil No. 1648

LEO TACKE, Plaintiff,

vs.

THE CANADIAN INDEMNITY COMPANY, Defendant.

JUDGMENT

This Cause came on regularly for trial before the Court sitting without a jury. The plaintiff was present in Court and represented by his counsel, Emmett C. Angland and William L. Baillie. The defendant was represented by its counsel, H. B. Hoffman and Orin R. Cure. Witnesses were sworn and testified. The cause was submitted to the Court for consideration and decision. Thereafter on the 26th day of May, 1956, the Court filed herein its Opinion and has filed its Findings of Fact and Conclusions of Law, to which documents now on file reference is hereby made as if the same were set out herein in exact words and figures. The Court in said documents found that the policy of liability insurance, being Policy Number 22 CA 3908, issued by the defendant to the plaintiff was and is a valid contract of insurance for the insured period 12:01 A.M., September 20, 1952, to 12:01 A.M., December 21, 1952, and the Court further found that the defendant is liable and obligated in accordance with the terms of said policy of insurance issued to plain-

tiff and the Court further found that plaintiff is entitled to recover from the defendant, reasonable attorney's fees in the sum of $1,500.00 and that judgment should be entered for such sum and costs in favor of the plaintiff against the defendant.

Wherefore, It Is Ordered, Adjudged And Decreed that the policy of liability insurance issued by the defendant to the plaintiff was and is a valid contract of insurance for the insurance period 12:01 A.M., September 20, 1952, to 12:01 A.M., December 21, 1952.

It Is Further Ordered, Adjudged And Decreed that the plaintiff have and recover of and from the defendant, the sum of $1,500.00 together with plaintiff's costs herein taxed at the sum of $131.30, and that such judgment bear interest at the rate of six per cent per annum from date hereof until paid.

Dated this 19th day of June, 1956.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed, Entered and Noted in Civil Docket June 19, 1956.

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Defendant respectfully moves the court to make the following amendments, respectively:

First—Of the Findings of Fact:

a) That paragraph 3 thereof be amended to read:

"3. That upon September 20th, 1952, between 9:00 and 9:30 A.M., Lenora A. Tacke, the wife of the plaintiff, acting for and in behalf of the plaintiff, ordered out a policy of automobile insurance from Bill Kelly Realty, and upon inquiry from the latter as to whether an accident had occurred, Mrs. Tacke replied in the negative. Thereupon, Bill Kelly Realty agreed to, and did, issue Policy Number 22 CA 3908, wherein the policy period was from September 20, 1952, to September 20, 1953 (12:01 A.M. Standard time at the address of the named assured as stated therein), and mailed the policy to plaintiff that day."

b) That paragraph 4 thereof be amended to read:

"4. That the automobile accident out of which liability coverage is claimed in this action occurred at, or before, 8:24 A.M. of September 20th, 1952. That plaintiff's written report of the accident to the insurance company, signed by him after reading it over and dated September 24th, 1952, contains the statement:

" 'Date of accident September 20, 1952, hour 9:30 o'clock A.M.'

"Thereafter, defendant cancelled said policy in accordance with the terms of said policy, and said cancellation became effective at 12:01 A.M. on the 21st day of December, 1952, and returned to plaintiff the unearned premium for the time subsequent to December 21st, 1952. The controversy was turned over to Hoffman and Cure thereafter, in behalf of defendant, and upon the 11th day of June, 1954, the latter returned to counsel for plaintiff their check for the remainder of the whole premium, in the sum of $9.83, for reasons stated in their letter, as follows:

" 'Canadian Indemnity Company declines to defend this action (Kissee vs. Tacke) for the reason that the loss had already occurred when the policy issued and had, in fact, occurred before the policy was ordered out and . . . because he (Tacke) refuses to collaborate or cooperate with us, and has given us notice that you are his attorneys in the matter, and have always been his attorneys . . .

" 'Notice of cancellation of the policy was given by the company under erroneous information that the accident had actually occurred after the policy was ordered out September 20th, 1952, and that because thereof ten days notice of cancellation was necessary.' "

c) That paragraph 5 thereof be amended t/ read:

"5. That neither Bill Kelly Realty nor defendant had knowledge that the accident had occurred prior

to the application for the issuance, and the promise of Bill Kelly Realty to issue the policy, nor did they have notice of any facts that should have put them on inquiry as to the same. That plaintiff failed to communicate to defendant the fact that the loss had already occurred when application for the policy was made, September 20th, 1952, and the application was accepted by Bill Kelly Realty, by virtue whereof the policy of insurance never did cover the loss involved."

d) That paragraph 6 thereof be amended to read:

"That defendant never did admit or assume responsibility or liability for this collision, and continues to admit or assume no liability arising therefrom."

e) That paragraph 7 thereof be amended to read:

"The evidence preponderates in favor of the defendant and against the plaintiff."

f) That paragraph 8 thereof be amended to read:

"A reasonable sum for the legal services of counsel employed by the plaintiff is the sum of $1,500.00."

Second—Of the Conclusions of Law

a) That paragraph 2 of the Conclusions of Law be amended to read:

"That the contract of insurance, being Policy No. 22 CA 3908, cannot be deemed or construed as covering the accident and ensuing damages or loss herein involved."

b) That paragraph 3 of the Conclusions of Law be amended to read:

"That defendant have and recover from the plaintiff defendant's costs necessarily incurred herein."

Third—Of the Judgment:

That the Judgment be amended to conform to the requested amendments of the Findings of Fact and Conclusions of Law, aforesaid; that plaintiff's complaint be dismissed, with costs to the defendant.

/s/ H. B. HOFFMAN,
/s/ ORIN R. CURE,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 26, 1956.

[Title of District Court and Cause.]

ORDER

In the above entitled cause motion by the defendant to amend the findings of fact, conclusions of law and judgment rendered therein has been submitted to the Court, supported and opposed by counsel for the respective parties to the action. As it appears to the Court all of the proposals of the defendant herein for amendment were questions raised and discussed in defendant's brief filed following the trial of the case, and therefore have already been considered by the Court.

The facts and the law of this case seem to have been very fully briefed, and were given very careful thought by the Court before its decision was rendered.

Counsel for the plaintiff has quoted quite extensively from the Court's decision, claiming that these quotations will fully answer all of the contentions of the defendant; while they may not answer all of the proposals of the defendant the Court has heretofore given all of them consideration before deciding the case, and is of the same opinion now in respect to that decision as it was at the time it was rendered. Of course, like other human agents and agencies, the Court may be in error, and if so it can quite easily be corrected. The Court was much interested in the able arguments of counsel for both parties to the action and devoted considerable time in examining the unusual state of facts presented in the case, and to the law that to the Court seemed applicable, and being duly advised herein, and good cause appearing therefor, in the opinion of the Court the motion to amend aforesaid should be overruled and such is the Order of the Court herein.

Exceptions allowed counsel.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 27, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are jointly bound to pay to Leo Tacke, the plaintiff, the sum of $2,000.00.

The condition of this bond is that whereas the defendant has appealed to the Court of Appeals for the Ninth Circuit from the judgment of this Court entered May 26th, 1956, if this defendant shall pay the amount of the final judgment herein, if his appeal shall be dismissed or the judgment affirmed or modified, together with all costs that may be awarded, then this bond is void, otherwise to be and remain in full force and effect.

THE CANADIAN INDEMNITY COMPANY,
/s/ By HERMAN S. DOTSON,
General Agent.

[Seal] ANCHOR CASUALTY COMPANY,
/s/ By ARTHUR W. BACON,
Attorney in fact, Surety.

Approved this 25th day of July, 1956.

/s/ W. D. MURRAY,
Judge.

[Endorsed]: Filed July 25, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Canadian Indemnity Company, defendant above named, hereby appeals to the U. S. Court of Appeals for the Ninth Circuit from the final judgment entered on the 26th day of May, 1956, and from the order entered June 27, 1957, denying the motion of The Canadian In-

demnity Company to amend findings of fact, conclusions of law and judgment.

/s/ H. B. HOFFMAN,
/s/ ORIN R. CURE,
Attorneys for appellant, Canadian Indemnity Company.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 25, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the papers hereto annexed, to-wit:

Complaint; Motion to Dismiss or Make More Certain; Order Overruling Motion to Dismiss or Make More Certain; Answer; Decision; Findings of Fact and Conclusions of Law; Judgment; Motion to Amend Findings of Fact, Conclusions of Law and Judgment; Order Overruling Motion to Amend Findings of Fact, Conclusions of Law and Judgment; Supersedeas Bond; Notice of Appeal; Concise Statement of Points Relied upon by Appellant; Appellant's Designation of Record on Appeal, and Designation of Additional Portions of Record by Plaintiff-Appellee, and the accompany-

ing Transcript of Evidence, are the originals filed in Case No. 1648, Leo Tacke, Plaintiff, vs. The Canadian Indemnity Company, Defendant, and designated by the parties as the record on appeal herein.

I further certify that Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, and 15, and Defendant's Exhibits Nos. 12, 13, 16 and 18, are the originals introduced in evidence at the trial of this cause and are part of the record on appeal herein.

Witness my hand and the seal of said court this 22nd day of August, 1957.

[Seal] DEAN O. WOOD,
Clerk as aforesaid,
/s/ By C. G. KEGEL,
Deputy Clerk.

In The District Court of the United States,
District of Montana, Great Falls Division

Civil No. 1648

LEO TACKE, Plaintiff,

vs.

CANADIAN INDEMNITY COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before Honorable Charles N. Pray, United States District Judge, without a jury, at Great Falls, Montana, commencing at 10:00 A.M. on July 28, 1955.

Appearances: Mr. Emmett C. Angland, Attorney at Law, Great Falls National Bank Building, Great Falls, Montana, and Mr. William L. Baillie, Attorney at Law, First National Bank Building, Great Falls, Montana, for plaintiff. Mr. H. G. Hoffman, of Hoffman and Cure, Attorneys at Law, First National Bank Building, Great Falls, Montana, for defendant. [1]*

The above entitled cause came on regularly for trial, before the court without a jury, commencing at 10:00 o'clock A.M. on July 28, 1955, at which time the following proceedings were had and done, to-wit:

The Court: Good morning gentlemen. Are you ready to proceed?

Mr. Angland: Plaintiff is ready, your Honor.

The Court: Defendant?

Mr. Hoffman: I believe the defendant is ready. Mr. Dotson of the Canadian Indemnity Company, the State Agent, told me that he would be in court this morning at 11:30; I don't see him but I am willing to proceed as it is.

The Court: Have you found him a man of his word usually?

Mr. Hoffman: I take it he will be here in a few minutes.

The Court: Well we will proceed with that understanding and perhaps you might make just a brief statement of the case for the record on both

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

sides and then we will have that for the introduction in the transcript.

Mr. Angland: May it please the court, this is a case for declaratory judgment, an action for declaratory judgment to determine the validity of an insurance policy. As we view it for an insurance policy for an insured period fixed by the company itself, and for which premium was received and up to the time, this time is still retained by [4] the insurance company. The case has some similarity I might say to the one your Honor decided in this court in Fireman's Indemnity Company vs. Show. We are dealing here as in that case—If you want the citation, Mr. Hoffman, it is 110 Fed. Supp. 523. That is a decision of this court. And in that case as in this case we are dealing with an agent authorized to enter into a contract of insurance; we likewise have in this case as in that case the law of waiver and estoppel. Now then you will find the facts briefly, and the only disputed fact as we view the case is a dispute as to the time of ordering the policy of insurance. The dispute on that question we don't believe in law is material at all, however, there will be evidence presented on that question. The fact is that the policy was issued September 20th, 1952; on its face it says that it is effective at 12:01 a.m. that date. It was issued for a period of one year. Three months later the insurance company, approximately three months, on December 10, 1952, the insurance company issued what is termed a notice of cancellation and said as of the face of the notice of cancellation "in accordance with the

terms of the policy". The policy is cancelled 10 days hence, December 21, 1952 at 12:01 a.m.

Following that cancellation the insurance company pro rated the premium. Now the insured, Mr. Tacke, sitting behind counsel here, had paid for the full year's premium. [5] The company pro rated the premium and retained the premium for the period from 12:01 a.m. September 20, 1952, to 12:01 a.m., December 21, 1952.

Thereafter the Highway Patrol of Montana issued what is termed an order of suspension. Probably your Honor is familiar with that law. There are three alternatives under our security requirement law.

The person*al* involved in an automobile accident, and Mr. Tacke had been involved in one on the date that the policy was issued, December 20, 1952. The Highway Patrol must find that there was a policy of insurance in effect or suspend the license of the driver for one year unless he puts up bond.

Now the Highway Patrol in this particular case issued the order of suspension directed to Mr. Tacke, and noted on the order that the Canadian Indemnity Company had advised them that Mr. Tacke had no insurance in effect at the time of the accident. The law permits an appeal from that decision of the Highway Patrol and an appeal was taken and the law requires that not only the Highway Patrol but any person in interest must be notified.

Now Mr. Baillie and I handled that matter and, of course, the records of court will be introduced

that shows and will show that the Canadian Indemnity Company was notified. [6]

Following the notification and the time set for hearing before Judge Speer a hearing was held and the Canadian Indemnity Company in effect defaulted; they didn't appear and didn't contest the action. So, of course, Judge Speer did what he must do under the circumstances what he must have done. He observed the policy of insurance appears to be effective on its face at 12:01 a.m. September 20, 1952, and he set aside the order of suspension.

Now the force and effect of that in law is that that is a determination by Judge Speer and we believe is an adjudication that Mr. Tacke was insured at the time of the accident on September 20, 1952. I don't believe any other result can be obtained no matter how it might be presented to your Honor. The Canadian Indemnity Company now was advised as I stated by official notice prior to that hearing.

Following that hearing and when Mr. Tacke was being threatened with suit arising out of the accident that occurred on September 20, 1952, we wrote the Canadian Indemnity Company under date of October 30, 1953. We advised the company of the decision of Judge Speer. We advised them that they had been notified. We advised them that Mr. Tacke was being threatened with a lawsuit and we at that time set a very nominal fee for having represented Mr. Tacke by reason of the breach of the contract of insurance by the [7] Canadian Indemnity Company. We advised the company at that

time we would accept $1,500.00 as attorneys' fees. The company I suppose just brushed us off. I think they referred the case to present counsel, Mr. Hoffman. We accomplished nothing as a result of that.

Finally in May of 1954 Messrs. James and Scott, representing Pearl Kissee, who was injured in the accident that occurred on September 20, 1952, filed an action. Pearl Kissee sued Mr. Tacke on May 22, 1954. Now that is of some importance because following the service of summons and complaint on Tacke we forwarded to the insurance company the complaint and summons as we would do when he carried insurance. Three days before their appearance was due, the 20 days had expired, we received a response; the nature of the response was a shock to us and I am sure it will be to the court; an attempt was made to refund the earned premium for the insured period fixed by the insurance company from September 20, 1952, to December 21, 1952; they had retained the premium all that time, but after he was sued in the District Court in Cascade County the attempt was made to refund that earned premium. Well, of course, that was rejected; nothing else could be done.

Now following that we filed this action for declaratory judgment and we are asking that the defendant insurance company live up to the terms of its contract; that [8] is all we are asking for is that they live up to the terms of the contract, save and except we do believe under the decisions and laws of Montana and the federal law as well we are entitled now to reasonable attorneys' fees by

reason of the breach of contract up to this date. We have asked previously for a few and after we filed this suit we have asked for $3,000.00 attorneys' fees, Mr. Baillie and myself. I might say to the court that there is no question here on the law of recission. Under the law of recission if there is any charge of fraud the person charging fraud must proceed expeditiously, and I find a general statement that is quite good on that. It says that the person charging the fraud may not speculate upon it and he may not lie in wait until time and a change make his interest plain and then make his——

Mr. Hoffman: May it please the court, may I inquire at this time whether it is permissible to argue the case?

The Court: No, it isn't necessary. What the court suggested was we just have a brief statement, an outline of the case. You can brief that later, Mr. Angland.

Mr. Angland: Very well, your Honor.

The Court: The authorities.

Mr. Angland: I merely wanted to call that to the court's attention so that we wouldn't unduly delay the trial [9] or wander beyond the scope of the issues in the case. I believe that that fairly states the facts, does it, Mr. Baillie or do you have something that might be added to that?

Mr. Baillie: I think that is very sufficient.

Mr. Hoffman: Well, if the court please, on the statement of the case just made to the court there is nothing for this court to adjudicate as to the

validity of this policy; Judge Speer has already done that if I understand his statement of the case clearly. Isn't that your position, Mr. Angland?

Mr. Angland: Not completely, no, Mr. Hoffman; there is an action on the adjudication of the facts; I think it is up to this court to determine whether or not there has been an adjudication by Judge Speer.

The Court: You challenge the question of adjudication, don't you?

Mr. Hoffman: I certainly do.

The Court: Yes, well then you don't need to dwell on that because that would be an issue to be determined.

Mr. Hoffman: But on his statement of the case he would have no right to adjudicate what has already been adjudicated so I was inquiring on that point on his statement of the case whether he is not out of court at this time and place on that point.

The Court: No, go ahead and make your statement of the defense. [10]

Mr. Hoffman: Their prayer in this court is that this court determine and declare and adjudicate the validity of this insurance policy, and declare that it was and is a valid contract of insurance of 12:01 a.m. September 20, 1952, and that the defendant is liable and obligated under the contract. Paragraph two of the prayer is for the $3,000 attorneys' fees and paragraph three of the prayer is the prayer for general equitable relief.

Now in answer to the plaintiff's complaint we

take issue with Mr. Angland there is no question of fraud involved in this case.

We take issue with his statement that the issue is not raised in the pleadings.

Our position briefly is this: That this policy of insurance was applied for at 9:30 a.m. on September 20, 1952, that the accident actually had happened at about 8:20 that morning before the application was made.

We have a two-pointed defense. First that if the loss had occurred when we promised to issue the policy at 9:20 that morning that in any event a loss already having occurred it could not be insured.

Now it is true in the printed form of the policy they have the term of the policy from September 20, 1952, midnight the term of the policy, 12:00 o'clock a.m. in [11] the policy is a printed part of the policy but under the law you cannot cover a loss already occurred or having already occurred by the application after the loss occurs.

Now our position is that while this policy was not actually drawn up until some time between 10:00 o'clock and noon that morning that the effective time of the policy was when Mrs. Halverson, who was the writing agent in Kelly's office, told Mrs. Tacke on the telephone that the policy would issue and took for the terms and conditions of the policy information sufficient to issue the policy proper.

It is our position that that insurance became effective just as soon as that application was ac-

cepted and no matter when they issued the policy later. Now I don't feel that the court cares to hear any more at this time.

The Court: Very well, call your first witness.

Mr. Angland: Mr. Hoffman, will you take the stand, please?

H. B. HOFFMAN

having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Angland): Will you state your name, please? [12] A. H. B. Hoffman.

Q. And you are duly licensed to practice law in Montana, Mr. Hoffman? A. I am.

Q. You are representing the defendant in this matter?

A. Our firm is attorneys of record.

Q. For how long a time have you been representing the Canadian Indemnity Company by reason of the issuance by that company of a policy of insurance dated 12:01 a.m. September 20, 1952 and designated policy number 22 CA 3908?

A. I do not remember the date that matter was referred to us, Mr. Angland.

Q. Could you refer to your file and tell us approximately when you first began?

A. I believe I should be—I have a note here that the Canadian Indemnity Company forwarded some papers to me on June 30, 1953.

Q. June 30, 1953?

A. Now whether there was any preceding correspondence I am not sure. I don't find any in the

(Testimony of H. B. Hoffman.)

file there but I believe that is approximately the date this was referred to us.

Q. Yes, and since that time you have been representing the Canadian Indemnity Company in all matters concerning the issuance by that concern of this insurance policy?

A. Well we had limited instructions. I have been [13] representing the Canadian Indemnity Company since that time, not continuously.

Q. And that date is?

A. We completed our investigation and sent a statement and then it was reviewed later in our office.

Q. Yes, well that is June 30, 1953?

A. That is approximately when the matter and the papers were referred to us.

Q. Will you look, please, Mr. Hoffman, at what has been identified as Plaintiff's Exhibit No. 1 and state whether or not you know what that is?

A. I do.

Q. And is the signature that appears in the lower right-hand corner of that exhibit your signature?

A. That is my signature and my letter addressed to you and Mr. Baillie.

Q. Under date of June 11, 1954, isn't it?

A. That could be the date that it was dictated.

Mr. Angland: We will permit the court to read it and then we will offer it in evidence.

Mr. Angland: We offer in evidence Plaintiff's Exhibit No. 1.

(Testimony of H. B. Hoffman.)

The Court: Any objection?

Mr. Hoffman: I believe not.

The Court: Very well, it may be received in evidence. [14]

[See page 195.]

Mr. Angland: Now, Mr. Hoffman, have you produced in accordance with the notice to produce the check referred to in Plaintiff's Exhibit No. 1 in the sum of $9.83.

Q. Directing your attention, Mr. Hoffman, to what has been identified as Plaintiff's Exhibit 2, will you state whether or not you know what that is?

A. That is the check that I enclosed with the letter and referred to in the letter marked Plaintiff's Exhibit No. 1 that had been enclosed with that letter.

Mr. Angland: We offer in evidence Plaintiff's Exhibit 2.

The Court: Any objection?

Mr. Hoffman: No.

The Court: It may be received.

[See page 196.]

Q. Now, Mr. Hoffman, Plaintiff's Exhibit 2 represents the amount of money retained by the Canadian Indemnity Company on the premium paid by Mr. Tacke for the period, for what we shall refer to as the insured period, is that the fact, Mr. Hoffman?

A. I have never computed that and issued that check on instructions. It is my understanding that

(Testimony of H. B. Hoffman.)

it is the balance of the premium that had not already been tendered, that was my understanding at the time.

Q. Now, Mr. Hoffman, the check, of course, Plaintiff's Exhibit No. 2 shows that it has never been cashed; it isn't [15] cancelled; that check was returned to you, was it not? A. Yes.

Q. And do you have the letter by which that check was returned to you?

A. I have it before me.

Mr. Angland: Yes, may I have it please.

Q. This Plaintiff's Exhibit 3 is the letter that you received and with which you received the return of the check identified as Plaintiff's Exhibit No. 2, isn't it? A. It is.

Mr. Hoffman: To which offer——

Mr. Angland: I haven't made the offer, Mr. Hoffman.

Mr. Hoffman: Well then we object to the court reading it if it isn't offered.

Mr. Angland: The court can't very well rule until it knows what is in the document.

Mr. Hoffman: We wish to call the court's attention to the very irregular method of getting this before the court without even offering it in evidence.

The Court: Well you object to it, Mr. Hoffman, do you?

Mr. Hoffman: He just stated he hasn't offered it in evidence.

(Testimony of H. B. Hoffman.)

Mr. Angland: I will at this time offer in evidence Plaintiff's Exhibit 3, your Honor.

Mr. Hoffman: And to which we object as being [16] a self-serving matter and having no relevancy or competency for any purpose.

The Court: I will overrule the objection and it may be admitted in evidence for what it is worth; it relates to this transaction about which you both have had correspondence.

[See page 197.]

Mr. Angland: That is all. That is all the questions we have at this time.

Mr. Hoffman: Mr. Cure is not in a position to examine me; he has had nothing to do with this case; he is sitting in for the trial.

The Court: Anything you want to state then the same as might be inquired into on cross examination why go ahead.

Mr. Hoffman: Yes.

Cross Examination

By Mr. Hoffman: The check.

Mr. Angland: I will get it for you, Mr. Hoffman.

By Mr. Hoffman: As I recall now this matter was first referred to our office about June, 1953, and with some preliminary consideration and the matter was held in abeyance as far as our office was concerned for a while, and it was reviewed in our office and after restudying the file forwarded I came to the conclusion——

(Testimony of H. B. Hoffman.)

Mr. Angland: Just a minute. Your Honor, I am [17] going to object to conclusions that Mr. Hoffman came to in his office or his surmises; we want the relationship.

The Court: You are coming upon legal arguments now and we will reserve all these legal arguments until the end of the case.

Mr. Hoffman: The reason this check was issued I am getting at——

Mr. Angland: Just a minute. Your Honor, I object to any explanation for the reason it was issued.

The Court: You issued the check at the direction of the company, didn't you?

Mr. Hoffman: No, they referred it to me and the matter was in my hands and I made the decision that that check should be issued.

The Court: That is enough for the record; you decided that check should be issued.

Mr. Hoffman: And the policy cancelled; it was issued in cancellation of the policy.

The Court: As a result of the investigation and thought about it?

Mr. Hoffman: Mr. Angland, do you have the letter I wrote accompanying this check?

Mr. Angland: I think that is right before you, Mr. Hoffman. The letter accompanying the check is June 11, 1954, Plaintiff's Exhibit No. 1. [18]

Mr. Hoffman: I think other than a statement how the check happened to issue is all I care to make.

The Court: That is sufficient.

VIOLA M. TOY

having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Baillie): Would you state your name, please? A. Viola M. Toy.

Q. And your occupation?

A. I am a Deputy in the District Court, Cascade County.

The Court: In the Clerk's office?

A. In the Clerk of the Court's office.

Q. Did you bring with you files in response to a subpoena issued through this court?

A. I did.

Q. Do you have File No. 39270 of the District Court of Cascade County? A. I have.

Q. And what is that file?

A. That file is the original legal documents on file in the Eighth Judicial District of Cascade County, Leo Tacke, appellant, vs. Glen M. Schultz, Montana Highway Patrol, respondent. [19] Register of Actions 62, page 530.

Q. And is that file the complete record of that case in your Clerk's office? A. It is, sir.

Q. Did you bring with you file No. 40243?

A. I have it, sir.

Q. Of the 8th Judicial District, in the District Court? A. I have it.

Q. And what is that file?

A. That is a file No. 42043 of the District Court, Eighth Judicial District, Pearl Kissee, Plaintiff,

(Testimony of Viola M. Toy.)

vs. Leo Tacke, Defendant, a damage action, filed in Register of Actions 64, page 223.

Q. And does that represent the complete file in the Clerk of the Court's office? A. Yes.

Mr. Baillie: Your Honor, we at this time ask the Plaintiff's Exhibit No. 4, file 39270, the original court file be admitted into evidence and we ask that a certified copy of the record be substituted and that the original may be withdrawn.

The Court: Any objection?

Mr. Hoffman: I want to see the exhibit, please, first.

The Court: Any objection? [20]

Mr. Hoffman: No objection.

The Court: It may be received under those circumstances.

Q. I hand you Plaintiff's Exhibit No. 4, would you please tell me what that is?

A. This is a certified copy of the original file, 39270.

Q. Certified by your office?

A. Certified by our office.

Q. I hand you Plaintiff's Exhibit No. 5, would you please tell the court what that is, please?

A. It is a certified copy of the 40243 original file.

Mr. Baillie: At this time we would like to offer in evidence Plaintiff's Exhibit No. 5 for file 40243 and ask leave to substitute the certified copy.

Mr. Hoffman: If the court please file 40243 is

(Testimony of Viola M. Toy.)

offered in evidence and I have not had an opportunity to examine it.

The Court: Is it before you now?

Mr. Hoffman: No, this is a substituted copy of it; he is proceeding on the theory that is the original court record. Are you offering it?

Mr. Baillie: I am offering it.

Mr. Hoffman: I misunderstood the question; I thought this was a certified copy.

The Court: No, he is offering the original and substituting the certified copy, isn't that it? [21]

Mr. Baillie: Yes. Mr. Hoffman has the original.

Mr. Hoffman: There is no objection.

The Court: It may be received in evidence.

Mr. Baillie: No further questions of this witness.

The Court: Any cross, Mr. Hoffman?

Mr. Hoffman: No.

TED JAMES

having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Angland): Will you state your name, please? A. Ted James.

Q. Where do you live, Mr. James?

A. Great Falls.

Q. And what business are you engaged in?

A. Attorney.

Q. Duly licensed to practice your profession in the State of Montana? A. Yes.

(Testimony of Ted James.)

Q. Mr. James, as a duly licensed attorney in the State of Montana, are you one of the attorneys representing Pearl Kissee who filed an action against Leo Tacke, being Cause No. 40243 in the District Court of the Eighth Judicial District? [22]

A. Yes.

Q. Mr. James, it appears that the file contains only the complaint and summons and though the case was filed in May of 1954 no appearance has been made by the defendant; will you state to the court what the situation is with respect to that matter?

A. My partner and I both knew that this——

Mr. Hoffman: Just a minute. If the court please, we don't believe that has any relevancy of any matter before the court at present.

Mr. Angland: If I may be heard on it, I will clarify it for the record.

The Court: It seems the answer is absent from the original file, is that it?

Mr. Angland: No, it isn't, your Honor. Mr. James and his associate, Mr. Scott, have refrained from taking a default against the defendant at the behest of Mr. Baillie and myself but he has been aware of the fact we have been representing Mr. Tacke for some period of time. We don't want to be charged with negligence in not handling the case.

The Court: Well you may make a record of it.

Q. (By Mr. Angland): Will you please just briefly state what the situation is, Mr. James?

(Testimony of Ted James.)

A. We knew that you and Mr. Baillie were both representing [23] Mr. Tacke's interests and you both had informed us there was a quarrel with the insurance company whether or not there was coverage on Mr. Tacke's vehicle at the time of the accident and at your request we did not take a default and merely allowed the matter to lay dormant pending a determination as to the validity of the insurance policy.

Q. Pending a decision in the case now on trial, isn't that the situation, Mr. James? A. Yes.

Q. Mr. James, can you recall when you first contacted either Mr. Baillie or myself concerning your representation of Pearl Kissee?

A. I believe it was sometime in the month of April, 1954; I am not positive.

Q. Did you have any discussion concerning the possibility of settling the damage claim that Mrs. Kissee had against Mr. Tacke?

A. Yes, we discussed that on several occasions.

Mr. Hoffman: If the court please, we object to going into these collateral matters.

Mr. Angland: I don't believe this is collateral, your Honor. We are asking for attorneys' fees here as well.

The Court: Overrule the objection; you may proceed with it. [24]

Q. (By Mr. Angland): Did we discuss the matter with you?

A. Yes, on numerous occasions.

Q. Do you recall whether any discussion was

(Testimony of Ted James.)

had with you concerning the interest of the insurance adjuster, W. D. Hirst, in this matter?

Mr. Hoffman: Now if the court please, I don't know how far they are going into collateral matters here when it is nothing in issue; if they want to testify what their reasonable attorneys' fees would be I suppose that is an issue.

Mr. Angland: I will withdraw the last question, your Honor.

Q. (By Mr. Angland): Mr. James, is there another case in addition to the Pearl Kissee vs. Tacke filed and pending in the District Court of the Eighth Judicial District? A. Yes.

Q. And what is the name of that case?

A. Ed Kissee vs. Tacke.

Q. And does that arise out of the same accident or not?

A. Yes, out of the same accident.

Q. Have you had summons served on Mr. Tacke in that case? A. No. [25]

Q. And why not?

A. There was no hurry to do it and we had summons issued and we were waiting for the determination of this particular case and we were in no great hurry to serve summons.

Mr. Angland: You may cross examine.

Cross Examination

Q. (By Mr. Hoffman): Mr. James, do you know about when Mr. Tacke hired Mr. Angland and Mr. Baillie as his attorneys?

(Testimony of Ted James.)

A. Oh, not exactly, I presume it was about the time that they had the hearing in Judge Speer's court, and that would have been before I talked to Mr. Angland because that is when and how I knew Mr. Angland was involved in it.

Q. Did you know that and that some time before that Mr. Angland or Mr. Baillie or both had gone down to Helena or both had gone down to Helena before the Commissioner of Insurance to exclude the Canadian Indemnity Company from doing business in the State of Montana?

Mr. Angland: Now just a minute. Your Honor, I object to the question; I object to the form of the question and on the further reason it is not the truth; I have never appeared before the Insurance Commissioner concerning this [26] matter and I don't want counsel inferring any such thing.

The Court: It isn't proper cross examination.

Mr. Angland: It most certainly isn't.

Mr. Hoffman: In the light of Mr. Angland's statement to the court I wish to inquire whether or not he or Mr. Baillie did not consult with Mr. Kelly in the Commissioner's office about this matter?

Mr. Angland: Mr. Hoffman, I don't know about Mr. Baillie and it doesn't make any difference if he had, I didn't. I have written to Mr. Kelly in the Insurance Commissioner's office because I believe then and I believe now that the Insurance Commissioner of Montana should have revoked the

(Testimony of Ted James.)

license of that company to do business in the State because of their handling of this case.

Mr. Hoffman: That is all I wanted to bring out was the statement he just made.

The Court: Well just proceed.

Q. So that you don't know the exact date when Mr. Angland entered into the case for Mr. Tacke then, do you? A. No, I don't.

Mr. Hoffman: That is all.

Mr. Angland: That is all.

The Court: Call your next witness. [27]

LEO TACKE

having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Baillie): Would you state your name? A. Leo Tacke.

Q. And your address.

A. 124—20th Street Southwest.

Q. That is in Great Falls? A. Right.

Q. What is your occupation?

A. Body repairman and truck mechanic.

Q. Where do you work?

A. International Harvester Company.

Q. Are you married, Mr. Tacke?

A. Yes, sir.

Q. Do you have a family?

A. Yes, we have 6 children.

Q. Are you the plaintiff, Mr. Tacke, in an action entitled Leo Tacke vs. Canadian Indemnity Company which is now before this court?

(Testimony of Leo Tacke.)

A. Yes.

Q. Mr. Tacke, would you please tell the court—let's rephrase the question — did you at any time, Mr. Tacke have any conversation with Bill Kelly or Bill Kelly Realty Company [28] of Great Falls concerning a certain policy of insurance on a '48 Chevrolet automobile? A. Yes, sir.

Q. And can you recall approximately the time of the first conversation or the conversation?

A. The first conversation naming the '48 Chevrolet to the best of my recollection is about two weeks before the accident, possibly three weeks.

Q. And what was the date of the accident?

A. September 20th, 1952.

Q. And where did this conversation take place?

A. I was putting in a lawn; he was up there where I was putting in the lawn.

Q. Mr. Kelly? A. Mr. Kelly.

Q. And you say you were putting in a lawn, was that also your occupation at that time?

A. I did that part time.

Q. And approximately where did this conversation take place?

A. On the lawn approximately 20th Street and Sixth Avenue South; I could place it but not the exact address.

Q. And what was this conversation?

A. I advised Mr. Kelly that we would insure the '48 Chevrolet which we were repairing with him. [29]

Q. Did you order the insurance at that time?

(Testimony of Leo Tacke.)

Mr. Hoffman: Just a minute. We ask that if that is a conclusion, we ask for the conversation.

The Court: Yes, state the conversation.

Q. And what other conversation was there?

A. I don't understand.

Q. Was there any other conversation at that time with Mr. Kelly? A. About insurance?

Q. Yes.

A. Yes, Mr. Kelly had agreed to pay me a commission on any mostly real estate that I listed, especially listings that I brought to his office. We expressed in this conversation that I appreciate this offer as a result of appreciation the policy on this car would be written with him.

Q. And was there any other conversation then concerning the insurance at that time?

A. At present I don't recall it.

Q. And did you at that time own a '48 Chevrolet automobile? A. Yes.

Q. Did you own any other automobile?

A. Yes, I was driving at that time a '38 Plymouth.

Q. And were you at that time driving the '48 Chevrolet? A. No.

Q. And did you have any other conversations with Mr. [30] Kelly or a representative of his office concerning this insurance policy in question?

A. Yes.

Q. When was that?

A. About a week later.

Q. And where was that conversation?

(Testimony of Leo Tacke.)

A. As I remember on Kelly's front lawn, his home addressed front lawn.

Q. And what were you doing at that time, how did you happen to be there?

A. I had put a lawn on Mr. Kelly's property and he stopped there and he paid me.

Q. And what was the conversation at that time concerning the insurance in question?

A. That the '48 Chevrolet which we were rebuilding from a wreck I had bought it as a salvage wreck, would be in running, in driving shape very shortly, within a matter of a few days and we were interested to know that he was covering it, and further we made further arrangements on how the policy would be paid.

Mr. Hoffman: Just a minute, please. We ask that the conversation be given and not his conclusions as to what was done.

The Court: Yes.

Q. You stated that you wished a policy of insurance to [31] be issued to be made available, is that what you said? A. Correct.

Q. And what other conversation was there?

A. That and as to the means of how the policy would be paid.

Q. And what was that conversation?

A. I had given Mr. Kelly a party that was interested in buying a lot and they had expressed to me appreciation for service I had rendered them and in return they said——

Mr. Hoffman: Just a minute, please. He is

(Testimony of Leo Tacke.)

going into a lot of hearsay; the conversation between Mr. Kelly and this witness.

The Court: Yes.

A. That he would be paid out of the commission on a lot that I was delivering to him for sale.

Q. And was there any other conversation as such concerning the policy at that time?

A. I don't recall it.

Q. And in referring to the date of the accident which you testified here was September 20, 1952 about how long prior to that accident did this second conversation take place?

A. About a week.

Q. And did you have any other conversations concerning this insurance with Mr. Kelly or a representative of his office? [32]

A. Not myself personally.

Q. Mr. Tacke, on September 20, 1952, you have testified that was the date of the accident, would you please indicate briefly the facts surrounding that accident? A. We——

The Court: Who do you mean by "we?"

A. I am sorry. I should say I and, my son and I left home to go to work.

Q. About what time did you leave home?

A. My wife, my son and I have established that time at——

Mr. Hoffman: Just a minute.

The Court: Just answer the question.

A. About 8:30.

Q. 8:30 A.M. or P.M.? A. A.M.

(Testimony of Leo Tacke.)

Q. And that was the morning of September 20, 1952? A. Yes.

Q. And what automobile did you drive that morning? A. The '48 Chevrolet.

Q. And why didn't you drive the Plymouth automobile which you also owned?

Mr. Hoffman: To which we object as not relevant.

The Court: Sustain the objection.

Q. And where did this accident occur?

A. The county road and 15th Street just south of Great [33] Falls.

Q. Do you know approximately when the accident occurred, the time? A. 8:40.

Q. And where did you or what happened following the accident?

A. I was unconscious and was taken to the hospital in an unconscious state.

Q. What hospital? A. The Deaconess.

Q. And how long were you in the hospital?

A. Until shortly before noon.

Q. And what did you do when you were dismissed from the hospital?

A. Went down, as I remember I stopped on the way home and reported the accident and the patrolman took me home and he took me down to the judge.

Q. And did you report the accident did you say?

A. As I remember I reported the accident on the way home.

Q. Where? A. At Kelly's office.

(Testimony of Leo Tacke.)

Q. And about what time would that be that you reported the accident?

A. Between 11 and 12, probably about 11:30.

Q. I hand you Plaintiff's Exhibit No. 6, Mr. Tacke, would you please tell the court what that is?

A. This is the insurance policy we received from Kelly as covering the 1948 Chevrolet.

Q. Covering the 1948 Chevrolet?

A. Correct.

Q. And what is the policy number?

A. 22 CA 3908.

Q. And the effective date of the policy as appears on the policy?

A. September 20th, 1952, 12:01 A.M. standard time.

Q. The accident occurred at what time again?

A. 8:20 September 20th or 8:40.

Q. This is the original and only policy which you received on this automobile at that time?

A. Right.

Mr. Baillie: We would like to admit this policy in evidence, your Honor.

Mr. Hoffman: There is no objection to the policy; that is set up in the complaint?

Mr. Angland: Yes.

Mr. Baillie: Same policy.

The Court: No objection?

Mr. Hoffman: No objection.

The Court: It may be received in evidence. [35]

[See page 12.]

Q. (By Mr. Baillie): Mr. Tacke, how did you

(Testimony of Leo Tacke.)

receive this policy? A. In the mail.

Q. I hand you Plaintiff's proposed Exhibit No. 7, would you please tell the court what that is?

A. This is the envelope in which we received the policy.

Q. And what is the postmark on that envelope?

A. September 20, 5:00 P.M., 1952.

Q. And this is from whom?

A. Bill Kelly Realty.

Q. Addressed to whom? A. Leo Tacke.

Mr. Baillie: We ask that this be admitted as evidence, Exhibit No. 7.

Mr. Hoffman: No objection.

The Court: It may be received in evidence.

[See page 199.]

The Court: We will have to take a recess. (11:00 A.M.)

Court resumed, pursuant to recess, at 11:20 A.M., at which time all counsel and parties were present.

The Court: Proceed, gentlemen.

LEO TACKE

resumed the stand and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Baillie): Mr. Tacke, I hand you Plaintiff's proposed Exhibit No. 8, would you please tell the court what that is?

A. This is the receipt for $39.00 that I received from Kelly's office in payment for the insurance policy.

(Testimony of Leo Tacke.)

Q. And what is the date of that receipt?

A. September 22, 1952.

Q. Signed by whom? A. J. Halverson.

Q. What is the receipt number?

A. Receipt No. 1849.

Q. And did you actually pay a premium for this policy? A. Yes.

Q. And when did you pay this money, did you pay it on the date indicated on the receipt?

A. On Monday, September 22nd at noon.

Q. And how did you make this payment?

A. By cash in the office.

Q. In Bill Kelly's office? A. Right.

Q. And was this the entire premium for the policy for the full year? A. Right.

Mr. Baillie: We offer Plaintiff's Exhibit 8 in evidence.

Mr. Hoffman: No objection. [37]

The Court: It may be received in evidence.

[See page 200.]

Q. (By Mr. Baillie): We will hand you Plaintiff's Exhibit No. 9, Mr. Tacke, would you please tell the court what that exhibit is?

A. It is a notice of cancellation of the insurance policy; it is dated December 10th, 1952.

Q. And to whom is that notice of cancellation addressed? A. To myself, Leo Tacke.

Q. And how did you receive that notice of cancellation? A. As I remember in the mail.

Q. And what is the date of that notice?

A. December 10th, 1952.

(Testimony of Leo Tacke.)

Q. And you believe you received it in due course of the mail? A. As I remember.

Q. And you know approximately when you might have received it?

A. Shortly after December 10th.

Q. Of 1952? A. Of 1952.

Q. And will you tell the court what the notice of cancellation states on what it is?

A. Under the terms——

Mr. Hoffman: Just a minute, please. We ask to see it first. [38]

The Court: Yes, you better show it to counsel.

Mr. Baillie: We will offer that in evidence, Exhibit No. 9.

Mr. Hoffman: No objection.

The Court: It may be received in evidence.

Q. (By Mr. Baillie): And I hand you Exhibit No. 9, would you please tell the court what the notice of cancellation states?

A. Under the terms——

Mr. Hoffman: Just a minute, please; the instrument speaks for itself.

The Court: Well let him read it; it is short, isn't it?

Mr. Baillie: Very short.

A. Under the terms of automobile policy No. 22 CA 3908 the companies give you notice of their desire to cancel and do hereby cancel the said policy, including any and all endorsements or certificates attached thereto, cancellation to become effective as of 12:01 A.M. of the 21st day of December,

(Testimony of Leo Tacke.)

1952, standard time. It is signed by H. S. Dotson Company, General Agent.

Q. Mr. Tacke, did you ever get this $39.00 back that you paid for this policy? A. No.

Q. Did you get any portion of the $39.00 back?

A. Yes. [39]

Q. And approximately when did you receive that portion?

A. Either December or January.

Q. December of what year?

A. December of '52 or January of '53.

Q. And do you recall the amount that was returned to you? A. Approximately $27.00.

Q. And how did you receive that money?

A. By a check in the Kelly, the agent Bill Kelly office.

Q. Was it delivered to you personally?

A. Yes.

Q. And have you ever received the other remaining balance? A. No.

Q. Mr. Tacke, I hand you Plaintiff's proposed Exhibit No. 10, would you please tell the court what that exhibit is?

A. It is an order of suspension of my driver's license.

Q. And what is the date of that order of suspension? A. April 28, 1953.

Q. And is that the original order of suspension which you received? A. Yes.

Q. And how did you receive that order of suspension? A. By mail.

(Testimony of Leo Tacke.)

Q. Approximately when? [40]

A. The latter part of April.

Q. Of what year? A. 1953.

Q. And indicating that was an order of suspension suspending what?

A. My driver's license.

Mr. Baillie: We offer Plaintiff's proposed Exhibit No. 10 in evidence.

Mr. Hoffman: If the court please, we are not contesting the fact that there was a suspension order issued at some time by Mr. Schultz but this apparently is not signed.

The Court: Do you know the party who issued it?

Mr. Hoffman: It is signed by typewriter Glenn M. Schultz, Supervisor. I wish to call the court's attention to it but we are not contesting that this suspension order issued.

Q. (By Mr. Baillie): Is this the only suspension order you ever received? A. Yes, sir.

Q. And this is the original which was sent to you? A. Yes, sir.

Mr. Baillie: Would you care to check it?

The Court: In view of the admission of counsel for the defendant that this situation isn't contested I will allow this to go in for whatever it may be worth. [41]

Mr. Hoffman: It is my understanding that such an order did issue.

The Court: Well proceed, Mr. Baillie.

Q. (By Mr. Baillie): Mr. Tacke, I believe you

(Testimony of Leo Tacke.)

testified you had reported the accident to the Bill Kelly Agency, is that correct, the same date as the accident? A. Yes.

Q. And do you know whether or let's say were you contacted by a representative of the Canadian Indemnity Company for the purpose of investigating the accident? A. Yes.

Q. And approximately when were you contacted? A. I believe about a week later.

Q. And where were you contacted?

A. Word was left for me to come to the Montana Claims Office.

Q. And did you go to the Montana Claims office? A. I did.

Q. And did you offer information concerning the facts of the accident requested from you?

A. Yes.

Q. Did you freely give this information?

A. Yes.

Q. Did you sign all documents requested to be signed by [42] the company? A. Yes.

Q. Do you feel that you cooperated fully and complete with the company in their investigation?

Mr. Hoffman: Just a minute, please. The report itself will be the best evidence as to what he did.

The Court: Yes, I think perhaps——

Mr. Hoffman: We have the report here, Mr. Baillie, if you want to introduce it in evidence.

Mr. Baillie: No, sir.

Q. (By Mr. Baillie): Mr. Tacke, when were

(Testimony of Leo Tacke.)

you, do you recall if you were ever notified or when you were notified concerning the fact that the policy wouldn't cover this particular accident?

A. Yes.

Q. And who notified you of that?

A. The adjuster or manager of the Adjustment Bureau.

Q. And approximately when was that?

A. About a week I believe after I made the, after I was to their office.

Q. And where was that, would you say where was that conversation?

A. In the International Harvester Shop.

Q. And who was present?

A. To the best of my knowledge no one but the adjuster [43] and myself.

Q. And what was the conversation at that time?

A. The adjuster came in.

Q. What was the name of this adjuster?

A. Mr. Hirst.

Q. And what was the conversation?

A. Mr. Hirst, the adjuster, came in and he had a paper of some type in his hand and he made reference to the claim he was handling, and says, why this is a case for fraud, and it was rather surprising to me, and I said, how do you get that, or something to that effect, and he said, you have a solicitor's license with Yeoman, and I said, yes, I did have.

Mr. Hoffman: If the court please, I don't know what this conversation is getting into but it ap-

(Testimony of Leo Tacke.)

pears to have collateral matters and we object unless it belongs to an issue in this case.

The Court: I don't know yet whether it is collateral or not, maybe some explanation will clear the atmosphere. What is the purpose of it?

Mr. Angland: The purpose of this evidence, your Honor, is to show that the company knew of any contention of fraud in the issuance of this policy within a very short time after the issuance of the policy and the accident; notwithstanding that fact more than two months, almost three [44] months later they cancel the policy. Now they are attempting to take the position that the policy never came into existence; that apparently is Mr. Hoffman's position from his opening statement and we take the position they knew all about the matter at the time of the cancellation at the time of the delivery of the portion of the premium that was returned at the time of cancellation.

The Court: Very well, you may show it.

Q. (By Mr. Baillie): And was there any other conversation at that time concerning the alleged fraud? A. Yes.

Q. And what was it?

A. I advised Mr. Hirst that I considered his threat; and he said that the company probably, Mr. Hirst, the adjuster, advised me that the company probably would not prosecute provided we immediately dropped the claim.

Q. Prosecute?

A. Prosecute Mrs. Tacke and I on a fraud

(Testimony of Leo Tacke.)

charge for presenting the claim to the policy. I advised Mr. Hirst that I considered that a bluff, that I considered bluffing as cowardice and that was the end of the conversation.

Q. And was there any other conversation with representatives of the Canadian Indemnity Company wherein this matter came up? [45]

A. The matter of fraud?

Q. Yes. A. Yes.

Q. And when and where?

A. Sometime later in December in the office of Agent Bill Kelly the——

Mr. Hoffman: What year, please?

Q. What year was this conversation?

A. December, 1952.

Q. And who was present at that time?

A. Bill Kelly, Jean Halverson and myself.

Q. Continue.

A. I had gone around to the people who had seen or had been established with knowing any of the details of the accident and taken the statements from these people to Kelly's office, the agent's office to clarify anything that could have been a confusion of statements as they had alleged there was. I asked for a statement from Jean Halverson as I felt this would immediately clarify everything; she refused to give it to me and came up with a statement, now there is a clause of fraud in the insurance and I think I will just have that pressed or something to that effect. I advised her in just about the same tone that I had Mr. Hirst and I

(Testimony of Leo Tacke.)

advised her that I had already told Mr. Hirst, the adjuster, the same thing. [46]

Q. And that conversation was December, 1952, is that correct?

A. The latter part of December, 1952.

Q. Mr. Tacke, when did you first decide that you should have counsel of your own in representing you in this difficulty?

A. About December, 1952.

Q. And did you do anything about your decision at that time? A. Yes.

Q. And what did you do?

A. I went to another attorney and presented him the facts of the case, presented him the facts of my——

Mr. Hoffman: Might we have the name, who it was?

Q. What is the name of the attorney?

A. John Stafford.

Q. And did he take the case?

A. No, he said there wasn't enough money in it.

Q. And did you go to any other attorneys at that time? A. Yes.

Q. To whom? A. Bradford.

Q. And did he take your case?

A. He said he would write a letter to the company.

Q. Did Mr. Bradford continue representing you for [47] sometime or what were the circumstances?

A. Yes.

(Testimony of Leo Tacke.)

Q. Just briefly? A. A very short time.

Q. And did you secure the services of another attorney or attorneys following that employment?

A. Shortly thereafter I did.

Q. And who?

A. First Mr. Baillie, yourself.

Q. Yes.

A. And Mr. Angland within a few days.

Q. And you say Mr. Angland within a few days? A. As I remember it.

Q. And when was it first brought to your attention that some claims might be pressed against you as a result of this accident?

A. Right after the accident.

Q. Did any attorneys contact you in reference to pressing claims against you?

A. Yes, but that was not until December, 1953, I think December, 1952.

Q. December of 1952? A. Correct.

Q. And who contacted you at that time?

A. Mr. O. B. Kotz I think is the name. [48]

Q. And what did you do following receiving notification from Mr. Kotz that a claim or claims would be presented against you, did you report that to the insurance company?

A. I reported that to the agent, Mr. Kelly.

Q. When did you report that to Mr. Kelly? Approximately?

A. Approximately right after he contacted me which would be in December, 1952.

Mr. Hoffman: If the court please, I didn't make

(Testimony of Leo Tacke.)

the objection before but Mr. Kelly is not shown to have anything to do with the adjustment of the claims of the insurance company; he is only a writing agent, and I left the other evidence go in because I thought it would be short and not encumber the record too much, but at this time now we do object to any conversation which he might have had with Kelly, especially if he knew Mr. Hirst was the adjuster and was handling the claim and we take the position, which is the fact, that Mr. Kelly had absolutely no authority whatever at this stage of the matter.

Mr. Angland: May we be heard, your Honor?

Mr. Hoffman: May I clarify to state that is anything or authority with regards to servicing this claim or representing the insurance company in regard to any accidents; that is out of Mr. Kelly's field entirely.

Mr. Angland: Of course, your Honor is interested in where the insured might go to report a claim. Here is the [49] allegation of plaintiff's complaint: "On September 20, 1952, and at all times mentioned herein, defendant designated Bill Kelly Realty of Great Falls, Montana, as an authorized representative with power to execute a contract of insurance." That allegation of the complaint, your Honor, is admitted in paragraph (a) of defendant's answer. So Mr. Kelly most certainly is recognized as an authorized representative.

Mr. Hoffman: There is no issue on that; he was authorized to write policies of insurance or he was

(Testimony of Leo Tacke.)
solicited to write policies of insurance; there is no issue on that.

The Court: Well you know those policies, most of them have some paragraph that requires the notification either of the company or to the agent of the company, the representative of the company of any accidents or anything in connection with an accident, it seems to me. I don't know whether this policy might contain such a paragraph but they usually do have something of that sort so that the agent is to be advised of any material matter affecting the company he represents; he might not be authorized to adjust claims or anything of that sort.

Mr. Angland: I think your Honor is right. The policy says: "Conditions 1. Notice of Accident—Coverages A, B and C. When an accident occurs written notice shall be given by or on behalf of the Insured to the company or any of its authorized agents as soon as practicable." Mr. Kelly, [50] of course, is an authorized representative and the delivery of Mr. Kotz's letter to Mr. Kelly would be notification to the company under the terms of the policy. I think your Honor is correct.

Mr. Hoffman: There is no question but what when he went back there the day of the accident and reported this accident to Mr. Kelly's office that was notice to the company; we don't question that. The notice was duly given; we don't question that; but after the claim was in controversy there was a question about it and Mr. Hirst was called in as

(Testimony of Leo Tacke.)

the adjuster; he had contacted this man and we think before the company should be bound by any conversations with Kelly after that they would have to show that Kelly had authority to represent the company in reference to this matter.

Mr. Angland: It is admitted in the pleadings that he is an authorized representative and the policy says, notify authorized representative.

The Court: Well there is a point there that might be or have some issue raised over it, I suppose. We will *let* it there and cover it briefly and I will see what we can do with it later on; it is a point that might be raised.

Q. (By Mr. Baillie): I hand you Plaintiff's proposed Exhibit 11, Mr. Tacke, would you please tell the court what that is?

A. This is a letter I received from Attorney O. B. Kotz [51] Attorney, advising me that Ed Kissie and wife were pressing claims as a result of the accident.

Q. And that is addressed to you? A. It is.

Q. And what is the date of that letter?

A. December 18, 1952.

Q. And how did you receive that letter; did you receive it in the mail in the normal course of the mails? A. I believe so.

Mr. Baillie: We offer Plaintiff's Exhibit 11 in evidence.

Mr. Hoffman: We have no objection in view of the court's ruling heretofore that the court has jurisdiction; we have no objection under the objec-

(Testimony of Leo Tacke.)

tions which we have already stated in the record to the court's jurisdiction.

The Court: You offer it in evidence?

Mr. Baillie: Yes.

The Court: It may be received.

[See page 200.]

Q. (By Mr. Baillie): You testified you hired myself and Mr. Angland shortly thereafter to represent you, is that correct? A. Correct.

Q. And have we been representing you since that time continuously? A. Yes. [52]

Q. Did we represent you in the appeal of the case of Leo Tacke vs. Glenn M. Schultz?

A. Yes.

Q. Of the State Highway Department Patrol?

A. Yes.

Q. Have we represented you in all other matters pertaining to the accident and the suits which were filed against you in Cascade County since that accident? A. Yes.

Q. And we have represented you in all of the matters pertaining to this present action, is that correct? A. Correct.

Q. Mr. Tacke, have you paid your present attorneys any sum or sums for the representation in all of these matters? A. No.

Q. Mr. Tacke, do you have any knowledge, this is Plaintiff's Exhibit No. 2, do you have any knowledge of the tender of that amount? A. Yes.

Q. By Mr. Hoffman on June 11, 1954?

A. Yes.

(Testimony of Leo Tacke.)

Q. Were you contacted by your attorneys?

A. Yes.

Q. In connection with this check?

A. Yes. [53]

Q. And did you advise your attorneys in connection with this amount as to what to do with the money? A. Yes.

Q. And what?

A. Send it back to them.

Mr. Baillie: That is all we have, your Honor.

Cross Examination

Q. (By Mr. Hoffman): I hand you now an instrument which the Clerk of the Court has designated as Defendant's Exhibit No. 12 and I will ask you to state whether or not that is your signature?

A. It is.

Q. And where did you sign that instrument?

A. I believe in the office of the Montana Claims Bureau.

Q. Yes, Mr. Hirst was present at the time and called in—in the office, wasn't he?

A. Not the first time.

Q. I say when this was signed Mr. Hirst was present when you signed this?

A. I don't know which one that is; I was there in the office twice; I don't know whether that is the first time or second time.

Q. Calling your attention to the date of the instrument [54] were you in Mr. Hirst's office? The date is on the other page, please. Is that the day that you signed it?

(Testimony of Leo Tacke.)

A. I believe it is; no recollection that it isn't.

Q. Satisfy yourself that is the day you signed it? A. Yes.

Q. And do you recall that Mr. Hirst took your statement and had his stenographer write it up?

A. I don't believe Mr. Hirst was present; I think his stenographer took that statement if I remember correctly.

Q. And she took it in response to questions that she asked you and information that you gave her?

A. Correct.

Q. And did you look it over when you signed it?

A. Yes.

Q. And you knew what was in it? A. Yes.

Mr. Hoffman: We offer Exhibit No. 12, being a report of the automobile accident in evidence.

Mr. Angland: No objection.

The Court: It may be received in evidence.

[See page 202.]

Mr. Hoffman: Would the court care to look at it?

The Court: No, I can look at it later.

Q. (By Mr. Hoffman): Now when you talked to Mr. Hirst at the International Harvester Company you say that Mr. Hirst said, why this is a [55] case for fraud, is that correct?

A. That is correct.

Q. Now what was Mr. Hirst talking about when he said that?

A. I testified he had referred to the policy to our claim for adjustment on the policy.

(Testimony of Leo Tacke.)

Q. And that was practically all that was said, it was a case for fraud, did he say anything else to you at that time about fraud?

A. When he made that statement it made me very angry.

Q. Will you please answer the question?

A. I don't remember.

Q. And you replied to him, I consider this a bluff? A. Correct.

Q. Did you say anything else to him about the issue of fraud at that time? A. Yes, I did.

Q. What else did you say to him?

A. I said that I would welcome, as I remember that statement was also to Hirst, that I would welcome they charge me with fraud, it would immediately prove my case.

Q. Now that was in reference to your having a license to write insurance under the Yeoman Agency, wasn't it? A. Right.

Q. Do you remember how you came to discuss this license [56] to write insurance at that time?

A. He told me that I had it; he brought up the discussion as I remember it.

Q. And he claimed that it was a fraud for you to be trying to get insurance out of the Kelly Agency when you were licensed to write it in Yeoman's office, is that it?

A. All I have is his statement.

Q. I am asking you?

A. You are asking me to draw the conclusions.

Q. Well the matter came up in reference to the

(Testimony of Leo Tacke.)

discussion of your license to write insurance, didn't it?

A. Can you restate it some way so I can understand it?

Q. No, not any simpler than that. You have testified yourself that he reminded you that your license was to write insurance out of the Yeoman office? A. That is correct.

Q. And that he charged you with fraud in connection with that, with your writing insurance; I am asking you, not telling you?

A. You are forcing me to express my conclusions; I would like to express them but you will reject them.

Q. I am repeating your testimony, your testimony is that Hirst reminded you that your license was to write insurance with Yeoman Agency?

A. Correct. [57]

Q. And that you were fraudulent in that connection, now that is what I understood your testimony?

The Court: Do you understand the question?

A. Yes, I understand the question, that it means that it would be a fraud for a man working at International to buy a Chevrolet; it would be a similarity there; it isn't, not in my mind.

Q. (By Mr. Hoffman): Yes, well, very well, I am asking for the conversation.

A. That was the conversation.

Q. And we don't care for your conclusions or

(Testimony of Leo Tacke.)

what you think about it, just what you think the conversation was?

A. That was the conversation.

Q. Or restating it Mr. Hirst was objecting to your having a license to write insurance out of Yeoman's office and working at the International Harvester Company at the same time, is that it?

A. No.

Q. Well then what was it?

A. He was objecting to the idea that I showed appreciation by buying insurance from someone out of appreciation and that made me mad.

Q. Oh, so that it had nothing to do with Yeoman's office and your license to practice under Yeoman's office?

A. My buying the insurance certainly did not.

Q. I mean his charging you with fraud?

A. That was what he was charging me with fraud for because I had showed him appreciation.

Q. Now this is Mr. Hirst that you were talking to? A. The adjuster.

Q. Now when you were talking to Jean Halverson in December, 1952, in Kelly's office, you testified that you asked her for a statement, what statement did you ask of her?

A. In regard to her conversation with Mrs. Tacke on the morning of December the 20th, 1952.

Q. What did you ask her about that conversation?

A. I simply asked her to give me a statement of that conversation.

(Testimony of Leo Tacke.)

Q. And all she gave you was a statement that there was a question of fraud involved in this matter?

A. She refused any cooperation of any kind, stating that she would continue to refuse any cooperation with me.

Q. Will you read the question?

(Question read.)

A. No.

Q. That is what I understood your testimony was on direct examination; what did she say to you? A. The conversation was long.

Q. How long were you in the office at that time?

A. Quite some time. [59]

Q. Give the court an idea?

A. An hour or maybe two.

Q. Can you fix the day in December that that happened?

A. Yes, I can, it was I believe December the 20th, possibly the 18th.

Q. Did anybody else ever charge you with fraud in this matter besides Mr. Hirst and Mrs. Halverson, that there was a question of fraud in the case did anybody else ever charge you with fraud in this case?

A. At present I can't think of it.

Q. Now as I understand Mr. Hirst did not charge you with fraud in making this claim, his charge of fraud of course was in connection with the writing of the insurance and obtaining the policy in the first instance?

(Testimony of Leo Tacke.)

A. He charged me with fraud for asking payment on the claim as I understood it.

Q. That isn't the way I understood your testimony on direct.

Mr. Hoffman: It is about noon, if the court please. That is all the questions I believe I would have of this witness but I would like to reserve the privilege until after recess.

The Court: Very well, we will suspend here and take a recess until 1:30 this afternoon. (12:00 noon 7/28/55.) [60]

Court resumed, pursuant to recess, at 1:30 o'clock P.M., at which time the counsel and parties were present.

The Court: Proceed, gentlemen.

LEO TACKE

resumed the stand and testified as follows:

Cross Examination—(Continued)

Mr. Hoffman: May I proceed, if the court please?

The Court: Yes, proceed, Mr. Hoffman.

Q. (By Mr. Hoffman): Mr. Tacke, you are the plaintiff in this action? A. Yes, sir.

Q. Did you have a license plate for '52 on the Chevrolet involved in this accident?

Mr. Angland: Just a minute. To which we object, your Honor. I don't know the answer but I don't see that that question or the answer thereto can tend to prove or disprove any issue in this case, the license plate.

(Testimony of Leo Tacke.)

The Court: What connection has it; any materiality at all?

Mr. Hoffman: If the court please, I am about to try to prove that it was after this accident that he became interested in getting his title, getting title to his car and he didn't make application for title to the car until considerably after the accident. Probably he consulted some of his attorneys.

Mr. Angland: Your Honor, that has nothing to do with [61] the insurance, doesn't tend to prove or disprove any issues in this case as we view it.

The Court: Well if you inject that into the case that will require the other side to go on and show what the circumstances were; they were evidently in possession and I presume they can show they were entitled to possession and whether their title was proved or not would have to be a material point.

Mr. Hoffman: Our point is that there was no application made for this insurance until after the accident and that everything happens after the accident.

The Court: Well I know but what would the question of the license plates do. You want to show he was driving without a license, without any plate at all?

Mr. Hoffman: No, that he didn't make his application for title until sometime after the accident; there was no thought of insurance in his mind really until after the accident and he began to get his title and it is relevant we think on the question

(Testimony of Leo Tacke.)

of whether he possibly did apply for this insurance before the accident.

The Court: Well, of course, according to the testimony as it stands now why he talked about insurance and applied for it a long time before the accident and before the policy was ever issued to him.

Mr. Hoffman: That is true. [62]

The Court: If those statements are to be credited so what difference does that make about it?

Mr. Angland: If they are challenging, your Honor, his title to the car, as to whether he owned the car or had a right to possession of the car, and whether it was a stolen car, we will withdraw the objection; but if they admit he had a right to possession and it was in his possession at the time I don't see that the inquiry would tend to prove or disprove any issue in this case.

The Court: If you think you can connect that in a material way to possibly show that he had no thought of getting insurance until after the accident or of proving title to the car or whatever you are trying to do, if you think you have got a point there, I will let you develop it, of course, but it looks a little farfetched just now.

Mr. Hoffman: I think it has some probative value.

The Court: Go ahead, we will decide that later on after we get the whole case. You may develop that point if you think you have a point to develop.

(Testimony of Leo Tacke.)

Mr. Hoffman: Will you read the question, please?

(Question read.)

A. No.

Q. You sent in the title for transfer of the title to yourself to the Registrar of Motor Vehicles, did you not? A. I didn't understand. [63]

Q. Will you read the question, please?

(Question read.)

A. I believe so, either I or my wife, yes.

Q. And you sent that in about the 27th day of March, 1953, didn't you?

A. The date I can't fix; it was sent in as soon as I had the car back in running shape after the accident.

Q. But you dated the application for change of title December 28, 1951, did you not?

A. I don't know; I may have.

Q. Do you remember whether or not the date of the application was dated about three months before you sent the application in?

A. I don't know.

Q. And the certificate of title issued to you the last of March, did it not, 1953?

A. I don't know.

Q. Can't you remember about when you got your title? A. No.

Q. Of course I understand the car is transferred and you no longer have the certificate of title in your possession, that is correct, is it not?

A. That is correct.

(Testimony of Leo Tacke.)

Mr. Hoffman: You may take the witness. [64]

Redirect Examination

Q. Mr. Tacke, did you ever sign an application for insurance for this particular policy?

A. No.

Q. Approximately when did you actually acquire possession of this '48 Chevrolet?

A. Late in the year of '51, I think about late in December or first of January, 1952.

Q. And in what condition was that car when you acquired possession?

A. It was a total wreck; it had been wrecked and salvaged by an insurance company.

Q. And what was your purpose in buying that wrecked automobile?

A. The car, the '38 Plymouth that I was driving was old; I intended to rebuild it to make an automobile of it and rebuild it in my spare time.

Q. And you have testified your occupation is that of automobile mechanic?

A. Automobile mechanic and body man, yes.

Q. And did you actually start repairing that vehicle when you acquired possession?

A. Shortly thereafter, yes.

Q. And I believe you testified that shortly before or at [65] the time of the accident the car was repaired or what was the status at that point?

A. It was practically completed.

Q. And was your car damaged in this accident of September 20, 1952? A. Yes, indeed.

(Testimony of Leo Tacke.)

Q. And did you repair it following that accident? A. Yes.

Q. And am I to understand that following the repairing of the car as a result of the damage in the accident of September of 1952 that you then applied for the title as you recall?

A. As I recall.

Mr. Baillie: That is all.

Recross Examination

Q. You mentioned the Plymouth that you were using, the other Plymouth, you had the two cars in 1952? A. Yes.

Q. And you had the Plymouth licensed and you were using that to go to and from work, were you not, in '52? A. Yes.

Q. And you also had it covered with insurance, didn't you? A. Yes. [66]

Mr. Hoffman: I think that is all.

Mr. Baillie: That is all.

ROBERT YEOMAN

was called as a witness by plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Angland): Will you state your name, please? A. Robert Yeoman.

Q. Where do you live, Mr. Yeoman?

A. Great Falls, Montana.

Q. And what business are you engaged in?

(Testimony of Robert Yeoman.)

A. General Insurance business.

Q. The Yeoman Agency at Great Falls is your business? A. Yes, sir.

Q. Are you acquainted with the plaintiff in this case? A. I am.

Q. And did you know him in the year 1952?

A. I did.

Q. Will you state whether or not your office issued what is referred to I believe as a solicitor's license to Mr. Tacke to sell insurance?

A. We did.

Q. And what type of insurance did you understand that [67] Mr. Tacke was to sell?

A. Hail.

Q. Hail insurance? A. Yes.

Q. And was his selling of insurance to be restricted to hail insurance?

A. Yes, at that time.

Q. Was that effective in September of 1952?

A. Frankly I haven't had a chance to look that up but I am sure it was.

Mr. Angland: You may cross examine.

Cross Examination

Q. (By Mr. Hoffman): Mr. Yeoman, did I understand your office issued the license or was it issued out of Helena?

Mr. Angland: May I interrupt you, Mr. Hoffman; I had one further question of Mr. Yeoman.

Mr. Hoffman: Yes, indeed.

Q. (By Mr. Angland): Mr. Yeoman, did Mr.

(Testimony of Robert Yeoman.)

Tacke ever sell any insurance on that solicitor's license? A. No.

Q. Never sold any insurance? [68]

A. No.

Mr. Angland: Now you may cross examine.

Q. (By Mr. Hoffman): Did you issue the license or was it issued out of Helena?

A. It is issued out of Helena.

Q. Upon your application?

A. On our application for it or his application through our office I should say.

Q. He made the application to write insurance through your office? A. That is right.

Q. And did he get a license?

A. He did get a license.

Q. Do you know where that license is?

A. I don't know where it is; we may have it in our files up there, Mr. Hoffman.

Q. Do you know whether or not it covered general insurance business?

A. No, a solicitor's license covers at least those we have cover the types of insurance written by the office that requests the license.

Q. So you are not sure at this time whether there were limitations in his license or not? [69]

A. I am sure there were no limitations as to what could be written.

Q. So that he would have been licensed to write liability and casualty insurance on automobiles out of your office?

A. If that is what we agreed to, yes.

(Testimony of Robert Yeoman.)

Q. That is he would be still subject to the contract of hire between you and him, is that what you mean to say? A. No.

Q. You say if we agreed to it?

A. What I referred to he wanted a license to solicit hail insurance; we had no understanding about any other type of insurance at all.

Q. But the license was broad enough for casualty insurance?

A. I doubt that he even knew that.

Q. I say it was broad enough?

A. It could be used for that.

Q. I think the law presumes he knew what his license was?

A. I don't think so because he was only interested in writing the hail.

Mr. Angland: Is it clear to your Honor what the situation is?

Mr. Hoffman: That is all. [70]

Redirect Examination

Q. (By Mr. Angland): In any event your understanding with Mr. Tacke at the time you secured the authorization was that Mr. Tacke would solicit hail insurance only, is that right, Mr. Yeoman?

A. If I may make a remark, our understanding with Mr. Tacke was that he has numerous relatives out in the north country——

Q. Where do you mean?

A. Out around Fort Benton and Ballantyne

(Testimony of Robert Yeoman.)

country and he thought he could write their hail insurance for them for that season.

Q. For his relatives?

A. For his relatives and friends in that vicinity, so therefore he come to our office and asked if we could get him a hail license, which we did, and that was our understanding.

Mr. Angland: I think that is clear enough, your Honor. That is all.

Mr. Hoffman: That is all.

Mr. Angland: Mr. Yeoman may be excused?

Mr. Hoffman: Yes.

The Court: Very well. [71]

Mr. Baillie: Mrs. Tacke.

LENORA A. TACKE

was called by plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Baillie): Will you state your name, please? A. Lenora A. Tacke.

Q. And your address?

A. 124 - 20th St. Southwest.

Q. And you are the wife of Leo Tacke?

A. Yes.

Q. The plaintiff in this case now pending?

A. Yes.

Q. Mrs. Tacke, are you familiar with the fact that an accident occurred on September 20, 1952?

A. September 20th, yes, I am.

(Testimony of Lenora A. Tacke.)

Q. And you are also familiar with the circumstances concerning the ordering of this insurance policy which is in question in this case?

A. Yes, I am.

Q. Did you at any time, Mrs. Tacke, ever make a written application for the policy in question with the Canadian Indemnity Company? [72]

A. No, I did not.

Q. Did you ever appear at the Bill Kelly Realty office for purposes of ordering this policy?

A. No, I did not.

Q. Did you at any time have any conversations with Bill Kelly or with representatives of his office in connection with the ordering of this insurance contract? A. Yes, three different times.

Q. And would you tell the court the approximate time of your first conversation and with whom?

A. Well it was about the 7th of September.

Q. Of what year? A. Of 1952.

Q. And to whom did you speak?

A. Well, Mr. Kelly called and wanted Leo to come up.

Mr. Hoffman: Just a minute, please. The question was, with whom did you speak?

Q. To whom did you speak at that time?

A. Mr. Kelly, Bill Kelly.

Q. And where were you at that time?

A. I was at home.

Q. And there was a telephone conversation?

A. Yes.

(Testimony of Lenora A. Tacke.)

Q. And what was the conversation at that time relative to the insurance contract? [73]

A. Well, Mr. Kelly called and wanted Leo to go up and give him an estimate on that small lawn he wanted to put in in the back of his rental property and I told Mr. Kelly at that time that Leo would go up and give him an estimate, and I said in appreciation, Mr. Kelly, for your giving us this lawn work we will take out insurance on the 1948 Chevrolet with you.

Q. And that conversation was about when?

A. Well the afternoon of about September 7th, some place in there about two weeks previous.

Q. To the accident?

A. Yes, as close as a person can tell.

Q. Was there any other conversation at that time concerning the insurance?

A. Well I called the number to the office and one of the salesmen answered.

Q. At that time or that same day?

A. No, that same day.

Q. I already asked as to the first conversation.

A. And he says, when you are ready that will be fine, is what he told me.

Q. And when was your next discussion or conversation with Mr. Kelly or his representatives of his office?

A. It was oh just a few days, possibly a week later I called in to the office in the afternoon when [74] the baby and little boy was both asleep, while it was quiet, to see if I could get hold of Mr. Kelly

(Testimony of Lenora A. Tacke.)

and one of his salesmen answered the telephone and said he was real busy and I asked him, I said I want to find out about some insurance; he said, we are real busy, you will have to talk to Bill about that and hung up, and so I left word for him to call us, at the office to be called; well I never got the call, I was never called back.

Q. And you testified there was a third conversation and with whom did you have that conversation?

A. Well Mr. Kelly called between twelve and one, on a Wednesday, about the 17th.

Q. 17th of what? A. September.

Q. What year?

A. 1952. He called because he wanted my dad. My dad had equipment, a little tractor and with this equipment they can clear weeds and do lawn work, and he wanted my dad to go up and clear the weeds and lawns and clear the rubbish off a piece of property he had for sale at about 37th some place and he said, if I can get the weeds cleared off this afternoon, I think I have a sale for it this afternoon before five o'clock. If he could get the weeds and rubbish cleared away from that property. So I assured him I would get hold of my dad and get him up there. He said, I am awfully busy and the [75] office is full of people, and I said to him, Bill, be sure Leo is covered by insurance, and he says, thank you, goodbye, and that was that conversation.

Q. Was it your intention at that time to order the insurance? A. Yes.

(Testimony of Lenora A. Tacke.)

Q. For the vehicle? A. Yes.

Mr. Hoffman: Just a minute, please. We object to her testifying to her intention or what she thought as leading.

The Court: Well was that the principal purpose of the conversation to order insurance?

A. Yes, I had been trying to get hold of him for a couple days.

The Court: Well all right we will let it stand that way.

Q. (By Mr. Baillie): And did Mr. Kelly issue that policy of insurance following that conversation?

A. We didn't get it through the mail so when I told Leo about that he said, you be sure and that Saturday morning——

Q. Do you mean——

A. We didn't receive it at that time.

Q. Did you expect that you would receive it following [76] that conversation? A. I did.

Mr. Hoffman: Just a minute. We object to her testifying what she expected, only what the conversation was.

The Court: Well, yes, perhaps.

The Court: One ordering a thing like that they usually expect a receipt of some kind in the usual ordinary course of events; I suppose that is what she was expecting to receive because she said her purpose was to order the insurance.

Q. (By Mr. Baillie): Mrs. Tacke, did you have any conversation with your husband during that

(Testimony of Lenora A. Tacke.)

time concerning the fact that you had not received the policy or concerning the policy?

Mr. Hoffman: Just a minute. To which we object——

The Court: Yes, sustain the objection.

Q. (By Mr. Baillie): Did you have any other conversations with Bill Kelly or representatives of his office concerning this particular policy or contract of insurance?

A. May I ask what you mean, that day or the rest of the week?

Q. No, any other following that conversation on Wednesday about three days prior to the accident?

A. Not on Wednesday, no. Not on a Wednesday I didn't. [77]

Q. When did you have another conversation if you did have one?

A. Early Saturday morning.

Q. What date?

A. September the 20th.

Q. Of '52?

A. Yes, Leo said to me be sure——

Mr. Hoffman: Just a minute.

Mr. Baillie: Just a minute.

A. I am sorry.

Q. (By Mr. Baillie): That particular discussion was a telephone conversation, am I correct?

A. Yes.

Q. And who initiated that telephone conversation, did you call?

A. On Wednesday morning.

(Testimony of Lenora A. Tacke.)

Q. Wednesday morning the conversation or Saturday morning you were discussing did you call?

A. Yes, Saturday I called twice.

Q. And about what time did you call?

A. The first time I called was a little before 8:30 in the morning and the line was busy and I called again before nine o'clock and our line was busy and I called the third time and got the office just a few minutes after nine. [78]

Q. And why did you, why were you placing that call, why did you make that call?

A. To see why that insurance hadn't come, to see why the policy hadn't come out in the mail yet.

Q. And you stated that you were successful in—— A. Yes.

Q. Making this call a few minutes after nine?

A. Yes.

Q. And to whom did you speak?

A. Miss Halverson.

Q. And what was that conversation relative to the insurance policy?

A. I asked her, I told her I called in to confirm that to see why we hadn't got that insurance policy that I told Kelly about.

Q. And what other conversation was there?

A. Well she said she would ask Kelly when he came in, in the meantime she would see that it was gotten right out.

Mr. Hoffman: I didn't hear that answer.

Q. Would you repeat that answer?

A. She said she would see Mr. Kelly and in the

(Testimony of Lenora A. Tacke.)

meantime she took down all the information and everything about the car.

Q. Was there any discussion concerning the type of insurance which you had ordered?

A. She asked me what kind I wanted, Miss Halverson [79] asked me what kind was wanted and I told her liability like required by the State law, ten twenty or five and ten or ten and twenty, whatever is the standard policy.

Q. Was there any other discussion as to type of policy?

A. She asked me if I wanted medical, $500 medical.

Q. And what did you say?

A. I told her yes.

Q. Did she say anything else?

A. She said, and she says, should I date this as of yesterday and I said maybe you should being that I talked to Kelly.

Q. And at the time you made this or these telephone calls Saturday morning the day of the accident did you know at that time that an accident had occurred? A. No, I did not know.

Q. And how many children did you have, how many children did you have at that time?

Mr. Hoffman: To which we object as incompetent, irrelevant and immaterial.

The Court: Oh, well, let her answer the question.

A. I had five small ones at home and one with his dad; they are all under 12 years of age.

Q. And was there anyone else present during

(Testimony of Lenora A. Tacke.)

this telephone conversation that you had present in your home?

A. No, just the children and I; I had a new baby six [80] weeks a little boy two and the other three not at home.

Q. And when did you first find out that an accident had occurred?

A. When an unidentified lady called me later.

Q. And do you have any idea when this call came?

A. It was about 10 or 15 minutes after I had talked to Miss Halverson; it was quite a bit after 9:00 o'clock because the radio program was on "Let's Pretend".

Q. You do not know the identity of the lady who called?

A. No, she did not give her name.

Q. What did she tell you?

A. She told me that there had been an accident and she wanted to know if I had a husband named Leo, and she said there was a boy that was hurt, and that they had taken them to the hospital in the police ambulance.

Mr. Baillie: We have no further questions.

Cross Examination

Q. (By Mr. Hoffman): Mrs. Tacke, I believe you testified in your deposition that Mr. Tacke had not been using this Chevrolet car until that morning?

Mr. Angland: Now just a minute; your Honor.

Q. Is that correct? [81]

(Testimony of Lenora A. Tacke.)

Mr. Angland: Just a minute. We object to the manner that counsel is attempting to use the deposition. Certainly counsel of Mr. Hoffman's experience knows the proper way to inquire of a witness on a deposition.

The Court: Yes, he can show it to her; show her the deposition and let her examine it.

Mr. Hoffman: I will withdraw the question.

Q. (By Mr. Hoffman): Had Mr. Tacke been using this Chevrolet before the day that this accident occurred?

A. If you mean using it for purposes; no, he took it down to have the frame straightened and things in regard to repair.

Q. In other words, Mrs. Tacke, is it not true that up to the date of this accident this Chevrolet was under repair? A. That is right.

Q. And Mr. Tacke was working on it?

A. He was working on it.

Q. And that he had made no commercial or personal use of the car excepting in connection with getting it repaired? A. That is right.

Q. How did he go to and from work?

A. In the '38 Plymouth coupe.

Q. And I believe Mr. Tacke has already testified the Plymouth coupe was insured? [82]

A. I insured it with J. E. Howard.

Q. Now when you telephoned to Mrs. Halverson September the 20th, 1952, you asked her to insure this car, did you not?

(Testimony of Lenora A. Tacke.)

A. No, I asked her to confirm the ordering of that insurance on Wednesday.

Q. Did you not ask her what kind of insurance you should take on the car?

A. No, I didn't ask her; she asked me what I wanted.

Q. And what did you say when she asked you what insurance?

A. I told her what was required to protect a person in the State of Montana by that new liability law that had been just recently enacted.

Q. And what did she say in response to that?

A. She said you want ten twenty and I took it for granted that was what was required was ten twenty.

Q. You took it for granted from what she told you that that was proper? A. Yes.

Q. And did you have in mind to get collision coverage? A. You mean what, on our car?

Q. Yes. A. No.

Q. Did you have in mind to get medical coverage when you first called her up? [83]

A. Yes, I certainly did.

Q. Was it not Mrs. Halverson that suggested to you that you might just as well take out $500 medical coverage?

A. She asked me if I wanted medical coverage.

Q. Well is it not a fact that it was Mrs. Halverson who first suggested medical coverage in that conversation?

A. That I can't remember; she was asking me

(Testimony of Lenora A. Tacke.)

the about the title, the information on a four door Chevrolet and those things.

Q. Now in all of these conversations to which you have testified did you ever mention to Mr. Kelly in any of these conversations what kind of insurance you wanted on this car?

A. I said on the insurance on the '48 Chevrolet liability.

Q. Did you tell him that you wanted liability insurance? A. That I can't remember.

Q. Did you tell him how much liability insurance or any kind of insurance you wanted?

A. That I don't remember whether I did or not.

Q. Did you tell him about how much property insurance you wanted at any time; I am talking now about the three conversations which you say you had before September 20th?

Mr. Angland: To which we object, there isn't anything in the policy to show there is any property insurance in the policy, your Honor. We object to the question as not tending to prove or disprove any issue in the case; [84] it is incompetent, irrelevant and immaterial.

Mr. Hoffman: She has property insurance, if the court wants to look at the policy, she has $5,000 property insurance and five and ten liability.

Mr. Angland: There is a property damage and public liability; isn't that what you are talking about, Mr. Hoffman?

Mr. Hoffman: I think you know what I am talking about.

(Testimony of Lenora A. Tacke.)

Mr. Angland: Well possibly the witness does not; maybe I can guess faster than she can; public liability and property damage is all there is.

Q. (By Mr. Hoffman): And was there medical insurance ever mentioned in your conversation with Mr. Kelly?

A. I didn't have a chance he hung up; he was very busy.

Q. Well you had three conversations with Mr. Kelly you said before this?

Mr. Angland: Just a minute. We object to that as not being an accurate statement of the testimony of the witness; the witness hasn't so testified.

Mr. Hoffman: That she had three conversations with Mr. Kelly I understand before the 20th.

Mr. Angland: Your Honor, I think the record will show she had two conversations with Mr. Kelly and one with a salesman and one with Mrs. Halverson in Mr. Kelly's office [85] and I think the record will so show.

The Court: Well the record will speak for itself when the court gets around to it. We will go on.

Mr. Hoffman: Proceed?

The Court: Yes, go ahead.

Q. (By Mr. Hoffman): You had never identified who it was that you talked with in Mr. Kelly's office that day, have you, before the 20th?

A. It was I think Tom Sterling, or I am not sure; it was one of the salesmen.

Q. That is one of the real estate salesmen?

A. One of the salesmen.

(Testimony of Lenora A. Tacke.)

Q. I am talking about Mr. Baillie's examination as to what the talks were between you and Kelly?

A. Not with Kelly and me; I didn't get a chance to tell him; I told him I want liability insurance on the 1948 Chevrolet.

Mr. Hoffman: I wish the reporter would go back and repeat that question to this witness. I want a direct answer if the court will permit it. I will repeat the question.

Q. There was no mention of limits on liability or [88] property damage or medical between you and any member of Kelly's office until September 20th, 1952, was there?

A. That I don't remember.

Q. Then you would not state on the witness stand that anything was ever said between you and anybody in Kelly's office about the limits of insurance?

Mr. Angland: Just a minute. Just a minute. We object.

Q. I mean prior to September 20th?

A. Not that I remember.

Q. Did you know that Mrs. Halverson was taking down your application for insurance while you were talking to her on the telephone?

A. She told me she was going to take down the information.

Q. And did you understand when you were telephoning to her that she was doing that?

Mr. Hoffman: Will you read the question to the witness, please?

(Testimony of Lenora A. Tacke.)

(Question read.)

A. Yes.

Q. Mrs. Halverson, I now hold in my hand——

Mr. Angland: I will object to him referring to the witness as other than Mrs. Tacke.

Mr. Hoffman: Thank you, Mr. Angland.

Q. Mrs. Tacke, I now have in my hand the instrument [89] which the Clerk of Court has marked Defendant's Exhibit 13, and I will ask you to state whether or not in the course of that conversation you came to an understanding with Mrs. Halverson that this policy was to issue as far as for bodily injury?

Mr. Angland: Just a minute. Your Honor, I am going to object to counsel propounding a question based on something I don't know whether this witness ever saw or had anything to do with or anything else, and let him show the exhibit to the witness, what part she had in preparing it.

The Court: Is her name supposed to be signed to it?

Mr. Hoffman: I want to see if this application is made in consance with her telephone conversation.

Mr. Angland: We object; she didn't make an application, and if she wrote the application or signed it, he should let her look at it at the proper time.

The Court: Mr. Hoffman, you have already questioned her with respect to the conversation and you have gone over that quite extensively, and now

(Testimony of Lenora A. Tacke.)

when you call the witness, when you call Mrs. Halverson you can show her that and ask her if that was their conversation and identify it in that way, but how can you do it with Mrs. Tacke; Mrs. Tacke doesn't know anything about that document you have in your hand and you have already asked her as to what the conversation was with Mrs. Halverson. Now why take any more time on that. [90]

Mr. Hoffman: I think that is correct too.

The Court: I think so. You bring that document up when you put Mrs. Halverson on the stand.

Q. (By Mr. Hoffman): Have you ever talked to this lady that called you on the telephone that morning and told you Leo and the little boy had been hurt in the accident?

A. She called back about 11:30 or 12:00 to see how they were, the morning of the accident; I still didn't know her name.

Q. Did you or did you not when you were talking to Mrs. Halverson on the telephone the morning of September 20th, 1952, tell Mrs. Halverson on the phone that your husband had told you to take out this insurance sometime before and that you had forgotten to attend to it?

A. I did not; the conversation was very brief.

Q. Is that the first time that you ever spoke to Mrs. Halverson about insurance? A. Yes.

Q. Now isn't it a fact, Mrs. Tacke, that on that conversation the only thing you said to Mrs. Halverson was, I want insurance?

(Testimony of Lenora A. Tacke.)

A. No, I said I wanted to confirm the ordering of that insurance.

Q. And isn't it a fact that when Mrs. Halverson called [91] you up and told you they would have to know what kind of insurance that you replied in substance, I don't care I want insurance?

A. She never called me up. I told her I wanted liability insurance. She never called me up at all.

Q. And isn't it a fact that you told her on that telephone conversation that you had tried to get Mr. Kelly the day before to order this insurance?

Mr. Angland: Now just a minute. Your Honor, we object to the repetition. The witness has said that Mrs. Halverson did not call her up and that should end the matter. If he wants to impeach the witness, he can go beyond with his witness. We object to any further inquiry as to the conversation on the ground that she has denied Mrs. Halverson ever called.

The Court: Yes, I think that would cover the ground all right, so you can bring that up from your own witness.

Mr. Hoffman: Mr. Cure has just suggested to me that I did not have the question framed right, by stating that Mrs. Halverson called you I didn't mean it that way.

Q. And I meant in this conversation with Mrs. Halverson and do you now deny that you stated to Mrs. Halverson that you were to get this insurance the Saturday before but that you were too busy and forgot to attend to it?

(Testimony of Lenora A. Tacke.)

A. I am sorry that wasn't even brought up. [92]

Mr. Hoffman: I think that is all.

Mr. Baillie: That is all.

MRS. HESTER M. DUSEK

was called by plaintiff and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Baillie): Would you state your name, please?

A. Mrs. Hester M. Dusek.

Q. And where do you reside, Mrs. Dusek?

A. I live on 14th Street Southwest on the old highway up Gore Hill.

Q. And that is in Great Falls?

A. Out of the city limits. We really don't have no address, just route one is all we go by.

Q. Do you recall anything about an automobile accident that might have occurred on September 20th, 1952 at the intersection of 14th Street and the old Helena highway road or Gore Hill road as it is sometimes called, I believe? A. I do.

Q. And is that location of that intersection near your home? A. Right on our corner.

Q. And do you know anything about that accident? [93] A. Well in just what way?

Q. Well did you see the accident?

A. No, I didn't see it when it happened.

Q. Do you know the time that that accident occurred? A. It was about 8:30.

(Testimony of Mrs. Hester M. Dusek.)

Q. And where were you when the accident occurred?

A. I was sitting on the davenport in the front room.

Q. In your own home?

A. In my own home.

Q. And did you go to the scene of the accident?

A. I did.

Q. And did you at any time or were you able to at any time identify the parties involved in the accident?

A. No, I couldn't identify them.

Q. Do you know whether that is the same accident that a Leo or Leo Tacke was involved?

A. Yes.

Q. How do you know that?

A. Because I called Bison Motors and found out that was who it was.

Q. Where did you get the information to call Bison Motors?

A. By the uniform he had on; he had Bison Motors on the back of it.

Q. You called Bison Motor Company?

A. That is right, I wanted to know if they had a man [94] late for work that morning and they said, no, I don't believe so, and I told them there was an accident on the corner and the man had a Bison uniform on, and the lady said, just a minute, and she went and said just a minute, and she went and talked to somebody and said, it must have been Leo Tacke because he used to work for them.

(Testimony of Mrs. Hester M. Dusek.)

Q. Did you know a Leo Tacke? A. No.

Q. What did you do?

A. I went back out to the car; the reason I went back I wanted to see if I could be of any help.

Q. And did you see this Leo Tacke at the scene of the accident?

A. Well he was unconscious sitting in the car for a while and then he finally got out and that is when I seen the Bison Motors on the back of his uniform.

Q. And did you at any time that morning call Mrs. Tacke concerning the accident?

A. Not until after the accident and after Mr. Tacke was on the way to the hospital.

Q. But you did make a telephone call to Mrs. Tacke? A. That is right, I did.

Q. And could you tell us approximately the time you called Mrs. Tacke?

A. Well it must have been possibly after 9:00 o'clock [95] because it seems like it takes the ambulance and police ages to get there. The little boy I had already sent to the hospital with some other people.

Q. You say after 9:00 o'clock, can you place it any better than that, any more definite?

A. No, I can't give anything more definite, between nine and nine thirty.

Q. Did you get Mrs. Tacke on the telephone?

A. I did.

Q. And what was your conversation?

A. Well I first asked her if she had been noti-

(Testimony of Mrs. Hester M. Dusek.)

fied from the hospital of any accident and a little boy getting hurt and she said, no, she hadn't. And I said, well, I wanted to find out who the boy is because Mr. Tacke told me when he got out of the car that he had his wife and little boy with him and I knew there wasn't no woman or baby in the car, and I wanted to find out who the boy was, and she said that was her son and she wanted to know what in the world happened and sort of went all to pieces and I told her nobody was hurt only the boy was cut in his right arm.

Mr. Hoffman: I do not like to object but we would like to proceed with question and answer.

The Court: Certainly.

Q. (By Mr. Bailie): Any other conversation at that time? [96]

A. She was very thankful that nobody was hurt seriously and she did say, I am very thankful and I thank God I renewed our insurance this morning and that was the end of our conversation.

Q. Did you make any other telephone calls that morning to Mrs. Tacke?

A. Not until toward noon I called, I called her again to find out how the boy was. I was interested in the boy because he seemed to be badly cut.

Mr. Baillie: That is all.

Cross Examination

Q. (By Mr. Hoffman): You say that she said to you, I thank God that I renewed my insurance today? A. This morning.

(Testimony of Mrs. Hester M. Dusek.)

Q. This morning? A. That is right.

Mr. Hoffman: That is all.

Mr. Baillie: That is all.

W. D. HIRST

was called as a witness by plaintiff, and having been first duly sworn, testified as follows: [97]

Q. State your name, please?

A. W. D. Hirst.

Q. Do you have your records and files in this matter with you, Mr. Hirst? A. No, I don't.

Q. You received a subpoena duces tecum to bring them with you? A. I did.

Q. And you did not bring your records and files with you? A. I did not.

Mr. Angland: We ask, your Honor, that the witness be instructed to secure his records and files.

The Court: What records?

Mr. Angland: There is a subpoena duces tecum issued to him.

The Court: What about it?

A. I do not have them, your Honor. We have turned the originals over——

The Court: What is this about?

Mr. Angland: He is the insurance adjuster.

The Court: The insurance adjuster for the company?

Mr. Angland: That is right.

The Court: What records did you ask for?

Mr. Angland: "All of your records in connec-

(Testimony of W. D. Hirst.)

tion with [98] the investigation for this defendant company concerning this insurance policy." That is our request here.

The Court: Did you make any written reports of your investigation?

A. Yes, and they were sent to the company's agency here.

Q. The company's agents here?

A. In Helena, Montana.

The Court: Did you subpoena the company agents in Helena?

Mr. Angland: Possibly I can clarify it for your Honor.

The Court: If they have the records, perhaps they are not available to the adjuster.

Q. (By Mr. Angland): Mr. Hirst, your name is W. D. Hirst? A. That is right.

Q. Where do you live?

A. Condon, Montana.

Q. Condon, where is that?

A. North of Seeley Lake 35 miles.

Q. In the fall or September, 1952, where did you live? A. In Great Falls, Montana.

Q. And in what business were you engaged?

A. Attorney and insurance adjuster.

Q. Yes, you are admitted to practice law in the State of [99] Montana? A. That is right.

Q. And you are an insurance adjuster and what is the name of your insurance adjusting concern?

A. The Montana Claims Adjustment Bureau.

Q. And the Montana Claims Adjustment Bu-

(Testimony of W. D. Hirst.)

reau is an independent adjusting bureau, is that right? A. Close.

Q. That takes assignments for investigations of various insurance companies? A. Yes.

Q. Now are you telling the court that in the course of making reports for your company, the Montana Claims Adjustment Bureau, that you do not retain file copies of correspondence, letters forwarded to you by companies that you represent, in your files; that rather you dispose of the entire file and return it to the company so you have no record of your work in the matter?

Mr. Hoffman: Objected to; if the court please, he has made no such statement.

Mr. Angland: I think he has.

The Court: That is an involved question; you ought to break it up a little bit.

Q. (By Mr. Angland): Mr. Hirst, will you tell the court how you handle a [100] matter that is referred to you by an insurance company?

A. The company assigns us a loss or the agent assigns us a loss; we set up a file on it and we conduct the investigation sending all originals and so forth——

The Court: What do you mean by "we"?

A. Our office, sir.

The Court: In Helena?

A. No, our office here in Great Falls; the Montana Claims Adjustment Bureau in Great Falls conducts the investigation and sends the reports to the company or their duly authorized agent,

(Testimony of W. D. Hirst.)

keeping a copy in our file we build up, saving a copy of everything.

Q. (By Mr. Angland): Yes. Now any letters directed to you by the insurance company are kept in your file in your office here in Great Falls?

A. Up to a certain point, yes.

Q. Well you keep the letters directed to the Montana Claim Adjustment Bureau or to W. D. Hirst in your office?

A. Yes, up to a certain point.

Q. And you keep all copies of the report you submit to the company in your office?

A. Yes.

Q. Now you have said up to a certain point a couple of times, you mean that you arrive at a point that you take your [101] entire file and send it to the company? A. No.

Q. Well don't you keep a permanent record of the cases that you have investigated that your office has worked on?

A. Up to a certain point again.

Q. What do you mean up to a certain point, tell us what that means?

A. Whenever a matter, a case that is referred to us gets into litigation we take our file in our office, the Montana Claims Adjustment Bureau office and turn our complete file, keeping no records whatsoever except our little identification cards we make when the matter is assigned to us and we turn that complete file over to the company designated attorneys.

(Testimony of W. D. Hirst.)

Q. Then your entire file at this time, I won't say at the time, was turned over to the attorneys for the Canadian Indemnity Company, is that right?

A. At the time that we were instructed to turn our file over to them we did that.

Q. Yes, you turned your entire file over to them? A. That is correct.

Q. And that file has remained in the possession of the company attorneys from that time until now?

A. To my knowledge.

Mr. Hoffman: Just a minute. He may not be qualified [102] to answer that question, if he knows.

Mr. Angland: He answered it.

A. I said to my knowledge.

Q. Is the file returned to you after the case has been disposed of?

A. Sometimes yes and sometimes no.

Q. Is there a rule on it?

A. No, just a matter of keeping records and clearing the records, our office records.

Q. Sometimes in your office you retain only a card index, is that right?

A. That is correct.

Q. Well then you have brought with you the cards? A. Yes.

Q. Well that is part of your records and file, isn't it, Mr. Hirst; you are a lawyer and you have read the subpoena duces tecum?

A. That is right. We do not consider that card a part of the file.

(Testimony of W. D. Hirst.)

Q. Well what is disclosed on that card? What would we learn by looking at that card?

A. The company involved, the name of the assured, the date of the assignment, the date the file was closed and billed and our fees on it.

Q. Did it show the dates on which you worked on a case? [103]

A. No, it would show nothing but what I have stated, no dates or who did the work or nothing.

Mr. Angland: Mr. Hoffman, do you have the file that Mr. Hirst prepared in this matter?

Mr. Hoffman: We did have it. If the court please, we did have it in our office a couple years ago and I don't know whether it is in the office or not.

Mr. Angland: Mr. Hirst, when did you first inform Mr. Hoffman of the subpoena duces tecum that you now have in your hand or Mr. Cure?

A. Yesterday afternoon.

Q. Yesterday afternoon you advised them that you had this subpoena duces tecum. Mr. Hirst, do you know without referring to your file when this case was assigned by the Canadian Indemnity Company to you for investigation?

A. No, I wouldn't know exactly; it wasn't assigned by the Canadian Indemnity Company.

Q. Well whoever assigned it to you?

A. I think it was assigned as I remember the date of the accident happening was on a Saturday and it was assigned the following Monday or Tuesday.

(Testimony of W. D. Hirst.)

Q. The following Monday would be September 22nd and it was assigned to you around, either September 22 or 23, 1952?

A. Yes, something like that. [104]

Q. Did you forthwith proceed with your investigation in this matter? A. Our office did.

Q. Either you or someone under your direction?

A. Yes.

Mr. Angland: If this case should continue over tonight, we hope that it will be completed, but if the case should resume tomorrow morning, we would like at this time to ask the court to direct this witness to talk with Messrs. Hoffman and Cure for the purpose of seeking that that file is available in court tomorrow morning.

The Court: Yes, either one, who is the custodian of that file they should produce it.

Mr. Angland: Yes, it is a court process directing it be done.

The Court: And if this Helena office has it why you may subpoena them to come here and bring it. If Mr. Hoffman has had the file in his office perhaps he has got it now.

Mr. Hoffman: Well, if the court please, Mr. Hirst came over to our office last evening before closing and told me about this subpoena. We have both searched, he has searched at his office and I have searched my office and I can't find it. I do remember Mr. Hirst bringing it to me right after; when this matter was referred to our office I [105] about the day that I gave, about in July 30, 1953

(Testimony of W. D. Hirst.)

remember Mr. Hirst bringing his file over to our office and going through it. I think that we returned the file to Mr. Hirst and I think we have returned it to his office and he doesn't think we have. We have already made a fairly diligent search for it in our office and could not find the file, and Mr. Hirst tells me he was done last night and we had a conference and he told me he could not find it in his office. Now the file has been closed in this case for a——

The Court: It wouldn't be in his office anyway; he says he sent it to the Helena office and discharged himself and all he leaves in his office is cards.

Mr. Hoffman: Carbon copies. We have not said anything up to now about this peculiar demand——

Mr. Angland: There is nothing peculiar about it.

Mr. Hoffman: Just a minute, please. I have never in 35 years of practice seen a demand that a person or a lawyer turn over their entire file to the other attorney. I think Mr. Angland should designate what he wants in that file or concerning what facts he wants.

The Court: He just simply wants the papers concerning this investigation, that is all. I don't know how he could designate it any more definitely.

Mr. Hoffman: Well I have got his report of his investigation that he sent down to Mr. Dotson in Helena who is the State Agent for the defendant. I have got that [106] report here.

(Testimony of W. D. Hirst.)

Mr. Angland: Was there just one report or more than one report.

A. No more than one report.

Mr. Angland: May I interrupt just a moment, Mr. Hoffman. I think the import of the first question demonstrates very quickly, if you will look at Mr. Hoffman's letter, Plaintiff's Exhibit 1 and paragraph (d) of the defendant's answer here and the import of their file becomes very important; it is demonstrated they are attempting to excuse the conduct of the company in affirming and confirming the issuance of the policy by reason of the notice of cancellation and trying to excuse themselves for their conduct and for not having refunded the entire premium. We want to know about those things. This is the man that did the investigating and we want to know when the company knew about these things and how much they knew about them and I believe we are entitled to know that and to show it to the court.

Mr. Hoffman: I believe, if the court please, I have in my hand substantially all if not all of this man's reports to the insurance company; that has been turned over to me by Mr. Dotson of Helena, the State Agent. But I do remember and I state to the court that several years ago Mr. Hirst delivered me his personal file to go through and [107] I know there was such a file. I can't swear under oath but I can almost say I returned it to Mr. Hirst, but it was his property and there was no

(Testimony of W. D. Hirst.)

reason it was not in his office and we closed this file and it remained closed until this suit was filed. We submitted our bill for fees and everything as being closed, and I am stating to the court and I would state under oath I do not know where that file is; if Mr. Hirst doesn't have it, and I don't believe it is in our office. Now anything Mr. Angland wants to see, anything he wants to see I think he is entitled to I will be very glad to show it and if he wants to see Mr. Hirst's original report of this accident, I will let him see it but I don't think Mr. Angland has the right.

Mr. *Hoffman*: I have a right to issue a subpoena duces tecum to a man who investigated the accident as this man did.

The Court: Part of the file was of Mr. Hoffman as attorney and the investigation of the adjuster is a different proposition? Have you shown this file to Mr. Angland, the report of the adjuster here, that is what he wants.

Mr. Angland: Yes, he has one report. The adjuster I think said he made several.

The Court: Suppose you look at that report and see if that is what you want.

Mr. Angland: I don't like to hold up the trial at [108] the moment, but I will be glad to do that, to look at the report you have and see if that will answer what I have in mind.

The Court: Have you communicated with the agency in Helena?

(Testimony of W. D. Hirst.)

Mr. Hoffman: We communicated with the defendant insurance company; it is the original report from him to the insurance company.

Mr. Angland: If I may have a moment, your Honor, I will look this report over and see if it will cover what we have in mind.

The Court: Very well, look it over.

Mr. Angland: This report is referred to as preliminary report and it refers to an early advance report so we only have here a preliminary report that follows an advance report that had been given and apparently a final report was given.

A. It is not there?

Mr. Angland: Mr. Hoffman has not showed it to us.

Mr. Hoffman: We have already introduced the preliminary report out of Mr. Hirst's office.

Mr. Angland: That is the accident report referred to in here, that is referred to as enclosure in this report; Mr. Hirst refers to that as an enclosure with this letter, and then he refers to this report as a preliminary report. [109]

Mr. Hoffman: Very well, there is the file; he may go through it and see Mr. Hirst's letters; I have no objection.

The Court: Well you better take some time and go through it and if that record isn't any good to you, you will have to find out where the other report is, if there is any other report because so far as the testimony goes here neither the attorney

(Testimony of W. D. Hirst.)

nor the adjuster know what has become of that report; they haven't got it they say. Well we can't require the impossible, you know. It is up to you to discover, if you can; it seems to me the only source there is available now for inquiry at any rate would be the Helena agency and see if it got back to their possession. I don't know what else we can do about it, do you?

Mr. Hoffman: That is about all.

Mr. Angland: No, I don't, your Honor.

A. (Witness) Your Honor, if I may make a suggestion, the advance report is in that file that Mr. Angland is examining.

The Court: That he is inquiring of?

A. Yes.

Mr. Angland: Is your final report in there?

A. The final report I think is there too. I wouldn't know without examining it.

Mr. Angland: I don't like to take the time of the [110] court now in looking at these things.

The Court: In the meantime when we take a recess you can read that and see.

A. This is the final report.

The Court: And finish with your examining and let's get moving.

Mr. Angland: Let's excuse this witness for a moment, your Honor, and we will proceed and call him after the recess.

The Court: Call your next witness.

Mr. Angland: Mr. Baillie.

WILLIAM L. BAILLIE

was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Angland): Will you state your name, please? A. William L. Baillie.

Q. And you are an Attorney at Law practicing in Great Falls, Montana?

A. That is correct.

Q. And you are one of counsel for plaintiff in this case? A. That is correct. [111]

Q. Mr. Baillie, for how long a period of time have you been representing the plaintiff, Mr. Tacke, in matters arising out of the issuance by the Canadian Indemnity Company of the insurance policy referred to as policy No. 22 CA 3908?

A. It would be slightly under three years.

Q. Now state to the court briefly what work you have done in connection with the case?

A. Starting early in the spring of 1953 I had many discussions with Mr. Tacke, also with Mrs. Tacke, concerning the case, concerning the facts of the accident. I had many discussions with Attorney Kotz who was at that time presenting a claim.

Following that in the early spring there was the order of suspension of the driver's license. I spent considerable time at that point in briefing the law in handling and in helping to handle the case where we appealed the order of suspension of Mr. Schultz, Supervisor of the Highway Patrol.

(Testimony of William L. Baillie.)

Following that decision of Judge Speer in 1953 there were some discussions with James and Scott, Attorneys, Ted James of that firm, concerning his representation of the claimants. There was considerable briefing of the law following a fairly extensive investigation checking the scene of the accident, checking with several witnesses, police investigations and so forth. [112]

Following that there was, as I state, considerable briefing of the law concerning the best approach to the matter insofar as handling the case for Mr. and Mrs. Tacke.

Then in the spring of 1954 two lawsuits were filed against Mr. Tacke. There was discussions and certain decisions to be made at that time concerning the correct way to handle things in view of the denial of any coverage of that at that time by the Canadian Indemnity Company.

And following that the bringing of this case, considerable research concerning the proper approach and proper method of bringing this matter to a court's attention for the Tackes, various conferences and many conferences with Mr. and Mrs. Tacke concerning the matter, preparation of the pleadings in this case and considerable research into the law.

Q. And briefing of the motion of the defendant to strike in this case and research in the law preparatory to the trial of this matter, is that right? A. That is correct.

(Testimony of William L. Baillie.)

Q. Now in most of that work I have joined with you, I think?

A. That is correct; in most of that work we were working together, that is correct; various conferences, I might say with you.

Q. Mr. Baillie, you are associated in the practice of [113] law with the firm of Jardine, Stephenson, Weaver and Blewett of this city?

A. That is correct.

Q. And for how many years have you been associated with that firm?

A. Between 6 and 7 years.

Q. And you by reason of discussions with members of that firm, Mr. Art Jardine, Mr. John Stephenson, Mr. Alex Blewett and Mr. John Weaver, and other members of the firm, and Mr. Chase, who used to be there, do you believe that you are in a position to fairly advise the court as to what a reasonable attorneys' fee to be allowed to counsel for the plaintiff in this case would be?

A. Well actually in the case I have not kept an up-to-date hourly record of time spent but I would say offhand for the actual time and in briefing law and discussions and investigations that certainly a fee of $1500 or even $2,000 would not be excessive.

Q. For each of us you mean?

A. For myself for the work I feel I have put in on the case.

Q. Yes, and we have asked for $3,000 in this case? A. That is correct.

Q. And half of that would be a very conserva-

(Testimony of William L. Baillie.)

tive allowance of a fee to you? [114] A. Yes.

Mr. Angland: Mr. Hoffman, have you with you the letter directed to the Canadian Indemnity Company under date of October 30, 1953, in accordance with notice to produce?

Mr. Hoffman: I have never seen that letter. I have not had it and never had it in my possession.

Q. (By Mr. Angland): Mr. Baillie, will you look, please, at what has been identified as Plaintiff's Exhibit 14 and state whether or not you know what that is?

A. That is a letter dated October 30, 1953, addressed to the Canadian Indemnity Company signed by myself and also by you in our representation of Mr. Tacke. Actually the letter was sent to the Canadian Indemnity Company in behalf of Leo Tacke in connection with this accident of September 20th, 1952, and advising them of the order of Judge Speer setting aside the order of suspension.

Mr. Hoffman: Now just a minute, the letter itself would be the best evidence.

Mr. Angland: Very well.

Q. Plaintiff's Exhibit 14 is a copy, a carbon copy? A. It is a carbon copy, yes.

Q. I notice the copy has both names, William L. Baillie and Emmett C. Angland, do you recall which one of us signed [115] that letter?

A. I don't recall which of us signed it.

Q. I don't recall. We collaborated in preparing it? A. That is correct.

Mr. Hoffman: Mr. Dotson is in court; may I

(Testimony of William L. Baillie.)
show it to him and see if he received the letter; if he did, I will admit it.

Mr. Hoffman: He has the original of that letter, if the court please, and we would just as soon give Mr. Angland his carbon copy.

Mr. Angland: We would rather have the original. We did serve a notice to produce on Mr. Hoffman; if they have it in court, we want the original one.

The Court: Well, all right, have you got it?

Mr. Hoffman: Mr. Dotson, did you remove it from the file. I had never seen that letter, if the court please, but I did know there was some such letter. It was not in Cascade County when the subpoena was served on me.

Q. (By Mr. Angland): Mr. Baillie, do you recall the response from the Canadian Indemnity Company to the letter dated October 30, 1953, do you recall that? A. Yes, I believe I do.

Q. I am directing your attention to Plaintiff's Exhibit No. 15—— [116]

Mr. Hoffman: Mr. Angland, would you mind letting me have your carbon copy?

Mr. Angland: That is the reason I asked for the original.

Mr. Angland: That is the only carbon copy I have, Mr. Hoffman.

Mr. Hoffman: Very well.

Q. (By Mr. Angland): Proceed.

A. Yes, this is the letter dated November 2nd, 1953. It is addressed to Emmett C. Angland from

(Testimony of William L. Baillie.)

Canadian Indemnity Company, United States head office Los Angeles, California, acknowledging receipt of our letter of October 30th and stating the matter had been referred to the general agent in the state of Montana, Mr. Dotson, and also stating Mr. Hoffman of Great Falls is the attorney representing this matter and directing that we contact Mr. Hoffman.

Q. And directed us to contact Mr. Hoffman?

A. Yes.

Mr. Angland: Now at this time we offer in evidence Plaintiff's Exhibit No. 14.

Mr. Hoffman: No objection.

Mr. Angland: Would your Honor care to look at that letter at this time or not?

The Court: Not now; I will have to read it all later on. [117]

[See page 207]

Mr. Angland: That is all, you may cross examine.

Cross Examination

Q. (By Mr. Hoffman): I believe you said you were associated with Jardine, Stephenson, Blewett and Weaver?

A. That I was associated with that firm, yes.

Q. With that firm? A. That is correct.

Q. And you usually work in connection with work in that office? A. That is correct.

Q. You may state to the court now whether or not that firm is interested in this lawsuit?

Mr. Angland: Just a minute. To which we ob-

(Testimony of William L. Baillie.)

ject, your Honor. The records and files in the case speak for themselves. The complaint is filed by the counsel of record in the case. We object to the form of the question and it does not tend to prove or disprove any issue in this case.

The Court: Yes, I don't think so. He is acting here as an independent attorney apparently.

Mr. Hoffman: That is what I wanted to bring out, that firm is not interested in this suit at all.

Q. (By Mr. Hoffman): Now these discussions you had with Messrs. James and Scott in connection with the suits that they filed do you have an express understanding with them that they will not enter the default in those cases as has been testified in this case?

A. I believe Mr. Angland would be in better position to testify concerning that since he handled that portion of the negotiations with them.

Q. You just testified you had been having discussions with James and Scott in connection with those matters?

A. I discussed, I had several discussions with James and Scott concerning the matters concerning the individual suits. Mr. Angland is in better position to testify but I can answer that. I believe it is my understanding and Mr. James has indicated he would not take a default, an understanding with Mr. Angland and myself pending any outcome of the issue which is present.

Q. And did you have that understanding with them before or after they filed their suit?

(Testimony of William L. Baillie.)

A. We got the understanding then following the filing of our suit; we did not know they were going to file suit.

Q. Before they filed the suit the matter had been in Mr. Kotz' office?

A. That is correct. [119]

When the suit was filed I personally did not know that James and Scott had taken it over.

Q. Did you personally have anything to do with the suggestion the default be not entered and leave it in status quo?

A. Well I don't know that there was a suggestion that that be done.

Q. I am asking you if you made that suggestion? A. I made no suggestion.

Q. Do you know whether Mr. Angland did?

A. I don't know.

Mr. Hoffman: That is all.

Mr. Angland: That is all.

The Court: Did you introduce all those letters?

Mr. Angland: I didn't offer the other letters, your Honor. I might at this time if I may be permitted.

The Court: I was wondering if you intended to.

Mr. Angland: I will offer it.

Mr. Hoffman: The letter October 30, 1953, that is admitted?

Mr. Angland: The record shows that is in, Exhibit 14. Now Exhibit 15 I will offer at this time.

Mr. Hoffman: We have no objection.

The Court: What is the exhibit number?

(Testimony of William L. Baillie.)

Mr. Angland: Plaintiff's Exhibit 15, your Honor.

The Court: It may be received in evidence.

[See page 210]

Mr. Angland: It is in response to Exhibit 14.

Mr. Angland: I presume I had better take the stand for a moment.

EMMETT C. ANGLAND

having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Baillie): State your name?

A. Emmett C. Angland.

Q. Your occupation? A. I am an attorney.

Q. And you are associated with myself in this case, Leo Tacke vs. Canadian Indemnity Company?

A. I am.

Q. And how long have you been representing in conjunction with myself Mr. Tacke in connection with the matter, in the matters under the Canadian Indemnity Company insurance policy.

A. I entered the matter and began representing Mr. Tacke with this about shortly after the issuance of the order of suspension by the Montana Highway Patrol and I believe that was issued in April of 1954, wasn't it, or 1953? May I look at the exhibit your Honor.

Q. I believe the exhibit will show that was 1953.

A. '53 is right.

Q. And you have been working and representing Mr. Tacke in this capacity since that time?

(Testimony of Emmett C. Angland.)

A. I have.

Q. And would you indicate approximately the type and amount of work that you have done for Mr. Tacke in this connection?

A. My testimony in that regard would be substantially the same as the testimony of the previous witness, Mr. Baillie. It has involved all of the matters to which he has referred and we have worked together on all of the matters connected with attempting to secure what we believe to be Mr. Tacke's rights under the contract of insurance.

Q. In that regard, Mr. Angland, in the complaint we have asked for the reasonable value of certain attorneys fees and indicated that reasonable value would be $3,000, in your opinion is that a reasonable charge?

A. I think it is a very conservative charge by reason of my experience in the practice for some 18 years I believe it is.

Q. Mr. Angland, have you paid any of the expenses in connection with the various suits filed and matters handled?

A. I believe that I have expended, possibly your office or you have paid some of the costs, but I believe that I have paid most of the costs, and I am reasonably certain that [122] Mr. and Mrs. Tacke have been unable to pay and we might say they have a large family; we haven't asked them to pay any of the costs up to this time, nor have we requested any fee of them.

(Testimony of Emmett C. Angland.)

Q. Do you have any idea of the approximate costs?

A. You have my office sheets there. I slipped them into the file.

Q. Do you identify these two pages which I am handing you?

A. Hand me my glasses too, Mr. Baillie, please. The cost sheet has to do with the case of Tacke vs. Glenn M. Schultz, Supervisor, Montana Highway Patrol. In that I have entries of the various documents and showing expenditure of $17.10. In the case of Leo Tacke vs. Canadian Indemnity Company, being the instant case——

Mr. Hoffman: If the court please, may it be understood we are objecting to this line of testimony as not a proper charge against the Canadian Indemnity Company?

The Court: Yes; it may be received subject to your objection.

A. There was expended in that matter filing fee of the District Court, service of summons paid the United States Marshall, $17.00 in all, and payment for the depositions of Mr. and Mrs. Tacke to R. L. Robertson in the sum of $17.10. I believe those were the expenditures in cash that I have [123] in their behalf.

Q. Since the filing of the complaint of Leo Tacke vs. Canadian Indemnity Company have you done considerable or have you done very much work in the case?

A. Since the filing of the complaint in this case?

(Testimony of Emmett C. Angland.)

Q. Yes.

A. I should say, well, preparatory to filing the case or since it was filed?

Q. Following the preparation and filing of that complaint?

A. Well there was considerable work involved, legal research to determine the nature of the case that should be filed, the type of proceedings to take against this company, and since the filing of the complaint the defendant filed a motion to dismiss. We were required to brief, prepare two briefs in that matter, one an opening brief and the case was submitted to the court under the rule permitting submission of motion on briefs. We filed an opening brief and reply brief and we have done considerable research in the law preparatory to the trial of the case here.

Mr. Baillie: I have no further questions.

Mr. Angland: Do you have any questions, Mr. Hoffman?

Mr. Hoffman: None.

Mr. Angland: The only other witness we believe we have is Mr. Hirst.

Mr. Hoffman: We have that other report. [124]

Mr. Angland: If we can have a short recess, we can look it over. We don't have the complete file as we want it, your Honor.

The Court: Very well, we will take a ten minute recess and give you an opportunity to examine that report and see if it is what you want. (3:30 P.M.)

Court resumed, pursuant to recess, at 3:45 P.M.

at which time all parties and counsel were present.

The Court: Proceed.

Mr. Angland: Mr. Hirst, would you take the stand?

W. D. HIRST

resumed the stand and testified as follows:

Direct Examination—(Continued)

The Court: Did the plaintiff rest?

Mr. Angland: We just have one or two questions of Mr. Hirst.

The Court: You are recalling Mr. Hirst.

Mr. Angland: Yes, your Honor.

Q. (By Mr. Angland): You are the same W. D. Hirst that was on the stand a few minutes ago?

A. Yes.

Q. Mr. Hirst, directing your attention to Defendant's [125] Exhibit No. 12, being the report of the automobile accident, it is noted that the driver of the other car is identified as Ed Zeen, did you determine in the course of your investigation that the name was not properly identified and that was actually Ed Kissee?

A. Our office in developing the investigation determined this was the wrong name.

Q. It developed that was a wrong name?

A. That is correct.

Q. And you directed the Canadian Indemnity Company to correct their records accordingly?

A. We notified them of the error.

Mr. Angland: That is all.

Mr. Hoffman: That is all.

Mr. Angland: Plaintiff rests, your Honor. [126]

GERTRUDE SCOTT

was called as a witness by defendant, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please? A. Gertrude Scott.

Q. And what is your present official position?

A. Records Clerk.

Q. In what office? A. City Police.

Q. Of the City of Great Falls, Cascade County, Montana? A. That is correct.

Q. And do you have with you an instrument which I have requested for you to bring with you to court? A. Yes, I have.

Q. Will you produce it, please?

A. I have the copy and the original.

Q. Handing you Defendant's proposed Exhibit No. 16, just now identified by the Clerk of the Court, will you state to the court whether this is a part of the records in your office?

A. Yes, it is.

Q. And did you produce it in court at our request? A. Yes. [127]

Q. And are you acquainted with a Mr. Swingley? A. Yes, Officer Swingley.

Q. And do you know his handwriting?

A. Yes.

Q. And that is his signature?

(Testimony of Gertrude Scott.)

A. That is his signature.

Mr. Hoffman: I believe we should step aside and I should put Mr. Swingley on for further proof of the document.

Mr. Angland: What is the exhibit number, Defendant's Exhibit 16, Mr. Hoffman.

LEROY SWINGLEY

was called as a witness by defendant and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Hoffman): Mr. Swingley, you may state your name, please.

A. LeRoy Swingley.

Q. And what is your official position?

A. Right now Police Department.

Q. You are a policeman in the Great Falls Police Force, are you not?

A. That is right.

Q. And were you such in the month of September, 1952? A. Yes. [128]

Q. Particularly on the 20th day of September, 1952? A. That is right.

Q. And what position were you occupying on the 20th day of September, 1952?

A. I was desk officer and ambulance driver.

Q. I will show you Defendant's proposed Exhibit No. 16 and ask you to state whether or not that is your signature?

A. This is my signature here on the reverse side.

(Testimony of LeRoy Swingley.)

Q. On the reverse side? A. Yes.

Q. And is this a report in your own handwriting? A. It is.

Q. And you may state to the court whether the matters portrayed in this exhibit are a full, true and correct portrayal of the facts they purport to portray? A. They are.

Q. And can you state of your own personal knowledge about when this report came in here?

A. The report was received at 8:24 a.m. on September 20, 1952.

Q. And that is the report of this Tacke accident? A. That is right.

Mr. Hoffman: Any cross examination?

The Court: Have you shown that to counsel?

Mr. Hoffman: I was going to offer it a little [129] later after she states it has been in her custody all this time.

Mr. Angland: If you want to introduce that, we have no objection.

Mr. Hoffman: And we will offer further foundation and we offer it in evidence, if the court please.

The Court: Yes, all right.

The Court: What time did he fix, 8:24 a.m. was it?

A. Yes, 8:24 a.m.

Mr. Hoffman: Call from a lady at 8:24 o'clock a.m.

The Court: All right, it may be received in evidence. That is an original document, you may want to send that back to the office.

(Testimony of LeRoy Swingley.)

Mr. Hoffman: We will attend to that right now. Do you want to examine Mr. Swingley?

Mr. Angland: We have no cross examination.

Mr. Hoffman: May Mr. Swingley be excused?

Mr. Baillie: Yes.

Mr. Hoffman: Will you take the stand again, please.

GERTRUDE SCOTT

resumed the stand and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Hoffman): I am handing you an instrument and I will ask you [130] to state whether or not you prepared this instrument?

A. Yes, I did.

Q. And is that a full, true and correct copy of the Defendant's Exhibit No. 16 just introduced in evidence? A. Yes, it is.

Mr. Hoffman: We are doing this for the purpose of letting her take it back and keep her files.

Mr. Angland: If you want to substitute a copy and it is an accurate copy we have no objection to the substitution, your Honor.

The Court: Very well, it may be substituted for the original.

[See page 211.]

Mr. Hoffman: And may the order further show she is permitted to take this original back to her office?

The Court: Yes.

Mr. Hoffman: You may cross examine the witness.

Mr. Angland: No cross examination.

Mr. Hoffman: May this witness be excused, please?

Mr. Angland: We have no objection.

CLARENCE FISHER

called as a witness by defendant and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please. A. Clarence Fisher.

Q. What is your present position?

A. Policeman.

Q. And were you a policeman in September, 1952? A. Yes, I was.

Q. And that is on the City Police Force of the City of Great Falls, is it? A. Yes, it is.

Q. And I notice if you will look at this copy which has been substituted for the original record your name is on it? A. Yes.

Q. Do you recall that accident?

A. Well only the call is all.

Q. You remember the call?

A. I was at the desk.

Q. And can you state of your personal knowledge whether or not this call actually came in at 8:24? A. 8:24 is the call time.

Q. I believe you worked on this accident that day?

A. I worked the desk; I answered the phone when the call came in.

Mr. Hoffman: You take the witness.

Mr. Angland: No cross examination. [132]

Mr. Hoffman: May this witness be excused, please?

The Court: Yes.

JANE HALVERSON

was called as a witness by plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please. A. Jane Halverson.

Q. Are you the Jane Halverson that's been mentioned through the testimony as being employed in the Kelly Real Estate and Insurance office in the month of September, 1953? A. Yes.

Q. Of 1952? A. Yes.

Q. And you may state to the court about what time you came to work on September 20th, 1952?

A. About 9:00 o'clock.

Q. Do you have a fixed time for arrival at your office?

A. We should be in the office at 9:00 o'clock.

Q. And is that the time that you actually arrived at your office that morning? A. Yes.

Q. And you may state whether or not in the course of that [133] forenoon you had a conversation with Mrs. Lenora Tacke?

A. Yes, about 9:30. I believe it is on the application.

Q. And you may state to the court please exactly what the conversation between you and Mrs. Tacke was on the telephone that morning?

(Testimony of Jane Halverson.)

A. Well Mrs. Tacke called and she said she wanted some insurance and she said she wanted it dated yesterday because she had tried to call us yesterday and I said, well, have you had an accident, and she said, no. So I didn't argue with her about it.

Q. Please testify to the court and not to me.

A. I just dated it the day that she called and tried to explain the policy coverage. I said, what kind of coverage do you want? She said, just standard coverage. I tried to explain liability, property damage and collision coverage to her and she was in such a hurry she just wanted insurance and I said, well, we will write, ten, twenty and five and five hundred medical, how is that? She said, that is fine, you can put it in the mail.

Q. Did you quote the rates on different kinds of insurance to her?

A. She just didn't have time to listen to me any more about it.

Q. About how long were you on the telephone with her?

A. Oh, just a very short time, just a few minutes. [134]

Q. And you may state whether or not during the course of the conversation you made a record of the conversation with her?

A. Well as I take an application for a policy when somebody gives a policy order for insurance we write it on the application the type insurance they want, the vehicle that is covered and the time

(Testimony of Jane Halverson.)

that the call came in and then we write the policy from the application.

Q. Handing you Defendant's Exhibit No. 13 you may state whether or not that is in your own handwriting except for the printed parts? A. Yes.

Q. When did you make those notations?

A. Right while she called me, when she was talking to me.

Q. That was made in the course of the telephone conversation, was it? A. Yes.

Q. And was that the usual course in your office when insurance is ordered to take a record of the application in this fashion? A. Yes, always.

Q. And calling your attention to the note the call was at 9:30 a.m. are you certain in your recollection this morning that that is the time this telephone call came it?

A. Yes, I put it down when she called. [135]

Mr. Hoffman: We offer Defendant's Exhibit 13 in evidence.

Mr. Angland: May I inquire of the witness, Mr. Hoffman?

Mr. Hoffman: Yes.

Q. (By Mr. Angland): I take it you can write shorthand, Mrs. Halverson, will you please read that for us?

A. Well to tell you the truth I can't "body man" it looks like "mechanic and body man," but I don't know what the abbreviated longhand would be; the shorthand I can read but not the longhand.

(Testimony of Jane Halverson.)

Q. Now I used to do a little shorthand myself and I can't—it looks like "mano"?

A. This part is "body man".

Q. The "s" on there must have another meaning, isn't that right? Mrs. Tacke never saw this?

A. No.

Q. Defendant's Exhibit 13?

A. She would have no way to see that.

Q. And Mr. Tacke never saw it? A. No.

Q. And neither of them were ever asked by you or anyone in your office so far as you know of in the Bill Kelly Realty office to sign this instrument?

A. We never asked them to sign the instrument.

Mr. Angland: We object to the introduction of the exhibit identified as Defendant's Exhibit 13, your Honor, on the ground and for the reason that it is incompetent, irrelevant and immaterial, an attempt to bind the plaintiff in this case by a document with which he was not concerned and had no control over making and didn't know it was made or anything about it.

The Court: Well, of course, there is another feature to be considered here in connection with that, that is a personal memorandum she made at the time in order to fix the facts and the time in her mind and without that memorandum she wouldn't be able to fix that time. If she was permitted to use something she wrote herself at the time, it would be admissible on that ground now.

Mr. Angland: Yes, your Honor, we agree with

(Testimony of Jane Halverson.)

that but not as an application, not as an application.

The Court: Well this is a memorandum she made.

Mr. Angland: As a memorandum.

The Court: She used it to bolster her memory of the exact time and place and date.

A. We bind coverage by those applications. Sometimes the policy is not written for a day or so even and we don't have time to do everything as it comes in so when the information is put on that form they are covered right at the—[137]

Mr. Hoffman: The plaintiff's case, if the court please, rests——

The Court: What is that?

Mr. Hoffman: The plaintiff's case rests pretty largely on what Mrs. Tacke as his agent has done.

Mr. Angland: Not at all. That isn't it, Mr. Hoffman.

Q. (By the Court): Well is it customary for customers to call you on the phone and ask for issuance of a policy?

A. Yes.

Q. And you carry on a conversation as to the kind of policy and amount of liability and so forth and so on and you make out this sheet as you go along?

A. Yes.

Q. And make up a policy for them?

A. Usually people are interested in what kind of coverage and how much it will cost; they just

(Testimony of Jane Halverson.)

don't want the insurance right now and no interest in what kind or how much or how much it will cost.

The Court: Very well.

Mr. Angland: Your Honor, we have no objection to the admission of that document as a memo she had in her office and kept in the usual course of the business but we do object to it as an application. [138]

The Court: I will admit it on that ground, that it is a personal memorandum that she made. Any further examination?

[See page [205]

Mr. Hoffman: Yes, there is, if the court please.

Q. (By Mr. Hoffman): Did Mrs. Tacke at that time make any statement to you about that she had tried to call Mr. Kelly the day before?

A. She didn't say Mr. Kelly or anyone in particular. She said, I tried to call you, she said, I tried to call your office the day before and she said that was the reason she wanted the insurance dated that date.

Q. Did she say anything to you at that time about Mr. Kelly having told her to get the insurance before he forgot about it? A. No.

Q. Did you hear Mrs. Tacke in this case?

A. Yes.

Q. Now in reference to her testimony that she asked you on the telephone that morning why Mr. Tacke's policy had not come through, did she make any such request of you that morning on the telephone? A. No.

(Testimony of Jane Halverson.)

Q. She says that when she asked you why the policy had not come through you told her that you would see Mr. Kelly about that, did you have any such conversation with her that morning? [139]

Mr. Angland: Just a minute. Your Honor, we ask that counsel not lead this witness, that he ask her questions without leading her; he is leading and suggestive in his questions.

The Court: Yes.

Mr. Hoffman: I am quoting her testimony, if the court please, and asking if that took place.

The Court: I think you can do that. I don't know how you could go about it if you didn't ask directly if the testimony is worded precisely.

Q. (By Mr. Hoffman): Did she at that time on that telephone conversation request you to date the policy a day before? A. Yes.

Q. And what did you say to that?

A. I said, have you had an accident?

Q. And what did she say?

A. She said no.

Q. When did Mr. Kelly appear on the scene that day if at all?

A. Well when, after he came to work which was, must have been close to ten I laid the application on his desk and told him of the details that the woman was a little fluttered, that she wanted to date the policy the day before and I said, well, what do you think about it, do you think [140] I should write it? And he said, well, all right. And I said, do you think they had an accident? He said,

(Testimony of Jane Halverson.)

of course, not, they wouldn't do a thing like that. So I wrote the policy.

Q. So you proceeded to write the policy under those conditions to Mr. Kelly's directions?

A. Yes, sir.

Q. Did Mr. Tacke call in that forenoon and report this accident?

A. No, I believe Mr. Tacke came into the office just before noon sometime.

Q. Just before noon?

A. Yes, and he reported the accident that it happened about 9:30.

Q. And did you have the policy issued at that time?

A. Yes, the policy had been written.

Q. Issued and signed? A. Yes.

Q. What did you do with the policy after you issued it?

A. I mailed it; I mailed it on my way home at noon.

Q. And where did you deposit it in the mail box?

A. In the box on the corner of Central and 6th Street.

Q. The corner of Central and Sixth Street in the mail box on the corner of the street you deposited it? A. Yes. [141]

Q. And did anybody request you to mail the policy to them?

A. Yes, Mrs. Tacke had requested we mail it. She said she would send in the motor and serial

(Testimony of Jane Halverson.)

number later but that she wanted the policy right away.

Mr. Hoffman: You may take the witness.

Cross Examination

Q. (By Mr. Angland): Mrs. Halverson, I think you said a few minutes ago that it is quite common to have these memorandum made up such as Defendant's Exhibit 13 and sometimes you issue the policy a few days later depending on when you get to it, is that right? A. Yes.

Q. You are not with Mr. Kelly now in that office? A. No.

Q. But that was the custom while you were there in the year 1952, wasn't it? A. Yes.

Q. Did you keep these slips on your desks so that you would have them available to write whenever you got a phone call of that nature?

A. Yes. [142]

Q. Did Mr. Kelly keep one of those on his desk?

A. Yes.

Q. And when he had one of those calls what did he do with it, do you know, did he hand it to you or type out the policy?

A. No, he sent it to me and I would type the policy.

Q. He would hand it to you?

A. Or he would tell me and I would put it down on the application.

Q. Oh, I see, Mr. Kelly didn't write up this type memorandum, he would give you the informa-

(Testimony of Jane Halverson.)

tion; after he received a request for insurance he would give you the information and you would put it on one of these memo sheets?

A. If I was handy he would give me the information; if not, he would put it on himself.

Q. He would put it on one of these himself?

A. Yes.

Q. After you learned that some difficulty and question had arisen concerning this particular insurance policy controversy here did you make a search of your office to determine whether or not there was any memo that might have been made by Mr. Kelly when he talked with Mrs. Tacke on September 17th, 1952?

A. I didn't make a search of the office, but——

Q. That is adequate, you have answered. [143]

A. But then again later Mrs. Tacke called and mentioned that and then I asked Mr. Kelly, I said, did she say anything to you previous to this on the telephone and Mr. Kelly said, no, if she had asked me or Leo had asked me for insurance, it would have rung a bell because I was under the impression he was licensed to write for Yeoman.

Q. In any event you didn't make a search of the office to find out if there was any memo on that matter on December 19th?

A. You don't have to make a search of the office; there is one basket.

Q. Well we all of course like to run an efficient office but sometimes we don't get things in the right basket, isn't that true, Mrs. Halverson, you have

(Testimony of Jane Halverson.)

office experience and you don't always get things in the right basket?

A. I don't find any trouble keeping it in the right basket.

Q. You don't? A. No.

Q. Well, you are a fortunate girl. And now when Mr. Tacke reported this accident shortly before noon on September 20th, 1952, did he report it to you or to Mr. Kelly? A. To me.

Q. To you? A. Yes. [144]

Q. Was Mr. Kelly present?

A. I don't remember.

Q. You don't know whether Mr. Kelly was in the office or not? A. No.

Q. And I suppose thereafter your office referred the matter to Mr. Hirst is the situation?

A. I tried to call Mr. Hirst's office and it was closed.

Q. That day?

A. Yes, so that must have been afternoon because I believe they leave at noon on Saturday, so then I reported it Monday.

Mr. Angland: I believe that is all.

Redirect Examination

Q. (By Mr. Hoffman): Just a minute, please. Mr. Angland inquired about your present employment, where are you employed at present?

A. I have an insurance agency in Shelby.

Q. In Shelby, Montana? A. Yes.

Q. When did you sever your connections with

(Testimony of Jane Halverson.)

Mr. Kelly's office? A. July 1st, 1954. [145]

Q. And have you had any business connections, that is, in Mr. Kelly's office since that time?

A. No.

Q. Had insurance for Tacke ever came up or been discussed in your office to your knowledge before September 20th, 1952? A. No.

Mr. Hoffman: That is all.

Mr. Angland: That is all.

BILL KELLY

was called as a witness by defendant, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please. A. Bill Kelly.

Q. And Kelly Realty Insurance have been mentioned here throughout the trial, what connection do you have with that office?

A. That is my office.

Q. Your business name, isn't it? A. Yes.

Q. And you were the agent of the Canadian Indemnity Company at the time? [146]

A. That is correct.

Q. Were you not? A. Yes.

Q. I am referring to September 20th, 1952?

A. Yes.

Q. Do you remember what time you came to the office that day, if you did?

A. Right at 10:00 o'clock.

(Testimony of Bill Kelly.)

Q. And do you remember of any conversation referring to this particular insurance?

A. Yes, that was the first thing brought to my attention by Jane was in regard to this insurance coverage with the Tackes, and, of course, I felt pretty good about it, and was a little bit surprised and I remembered Jane's reason for bringing it up particularly because Mrs. Tacke seemed excited and I might add I have had enough phone calls with Mrs. Tacke and I know she has her problems with her children and she calls and carries on business about landscaping when Leo was working so my experience with her was she was just a little bit long-winded and excited and it didn't seem out of order for me because she has her problems.

Q. So Mrs. Halverson was suspicious of this application? A. Yes, Jane was.

Q. And conveyed that to you?

A. Yes. [147]

Q. And what did you do in reference to that, did you say anything to her about the policy, about issuing the policy?

A. Well I just judged it on things on the merits, I had known Leo and had a few dealings with him, ordinary dealings and I thought his character was beyond reproach.

Mr. Hoffman: If you will just listen to the questions and then answer.

Q. Did you say anything to Jane about issuing the policy?

(Testimony of Bill Kelly.)

A. I decided I should write it; we knew of nothing else at the time.

Q. Did you at that time have any notice or knowledge that the accident had actually happened before that?

A. No, the first time I knew of an accident was when I returned after a noon appointment. I arrived about twelve or a little after possibly and here was the loss claim sitting on my desk.

Q. Did you know who reported the accident?

A. A notation showed that Mr. Tacke had.

Q. Did it show about what time in the day that he reported the accident?

A. Not to my knowledge.

Q. I believe his testimony was it was reported between 11:30 and 12:00, would that be about according to your knowledge? A. Yes. [148]

Q. As near as you know? A. Yes.

Q. Do you know whether the policy had been written up at that time?

A. Yes, it was written.

Q. Did Mr. Tacke's report on the accident state when the accident had occurred? A. No.

Mr. Angland: Just a minute, the best evidence on that would be the memorandum and we have that, your Honor; the report of the accident would be the best evidence of that.

Q. I now show you the document marked by the Clerk of the Court as Defendant's Exhibit No. 17 and I will ask you if this is the loss report you found on the desk you speak of? A. It is, yes.

(Testimony of Bill Kelly.)

Q. And is that a part of the records in your office in connection with the case? A. It is.

Q. And calling your attention to the typewritten part of your report and also the part that is written below in pen and ink, was this part that is written in pen and ink a part of the original loss report that you found on your desk at the time?

A. I am sure that this written in here in longhand was [149] done after it was originally typewritten.

Q. So that as to the report you found on your desk that morning it was just the typewritten part?

A. Yes.

Q. And this part written in pen and ink was put in later, is that correct? A. Yes.

Q. Have you any way of fixing the time that that was put in with pen and ink?

A. Well it says disposition of payment.

Mr. Baillie: Just a minute. Your Honor, this has not been placed into evidence or attempted to be placed into evidence and we haven't seen it.

Mr. Hoffman: I am asking him now if he knows when this part was made up.

Mr. Baillie: As to the contents of the document?

Mr. Hoffman: The question is if he knows what time.

A. I don't know what date this handwritten information was put in there; it is Mrs. Halverson's writing.

(Testimony of Bill Kelly.)

Q. Will you remove that from your file, please, Mr. Kelly?

Mr. Hoffman: We offer Defendant's Exhibit No. 17 in evidence. [150]

Q. (By Mr. Baillie): Mr. Kelly, do you know of your own knowledge who prepared this document? A. Yes.

Q. And who prepared it?

A. Jane Halverson.

Q. How do you know that she prepared it?

A. It is also on the office form and we fill that out in our own office for our own knowledge.

Q. But you testified you found this on your desk when you returned? A. Yes.

Q. Do you know who wrote the pen and ink notation? A. Yes.

Q. Who was that? A. Jane Halverson.

Q. How do you know that?

A. I know her handwriting.

Q. Do you know when it was written?

A. I don't know the time following the typing, no. Of course, that refers, the handwriting refers to the disposition of the cash and it was in suspense for a little while; I don't know what time that was put in there.

Q. You have no idea when she might have written that pen and ink notation? A. No. [151]

Mr. Angland: Your Honor, we object to the document; there is some writing here that we don't know how it was appended to this document and

(Testimony of Bill Kelly.)

it is an attempt apparently to bind the plaintiff by some pen and ink writing at some later time.

Mr. Hoffman: We will withdraw the offer at this time, if the court please, and find out when Mrs. Halverson wrote it.

Mr. Angland: I asked for a report Mr. Tacke made; I didn't ask for a report of Mr. Kelly. If Mr. Tacke made a report, then I want them to produce that.

Mr. Hoffman: That is in evidence, if the court please.

Q. (By Mr. Hoffman): Now, Mr. Kelly, you heard Mrs. Tacke testify in this case, did you?

A. Yes, sir.

Q. In reference to about 2 or 3 weeks before the accident — strike that question — did you also hear Leo Tacke's evidence in this case?

A. Yes, sir.

Q. Now referring first to Leo Tacke's testimony about 2 or 3 weeks before the accident, do you recall Mr. Tacke's putting in a lawn out on 28th Street and 6th Avenue South?

A. Yes, sir. [152]

Q. Did Mr. Tacke while he was on that job have a conversation with you at the site of the work? A. Yes, sir.

Q. And will you narrate to the court what that conversation was?

A. Well the conversation of course was over three years ago and I can't recall the details; it was generally and completely about landscaping; in

(Testimony of Bill Kelly.)

the conversation I have no recollection about ordering any insurance as Mr. Tacke has testified.

Q. Did Mr. Tacke at that time say to you in substance or effect that when he was ready to insure he would insure this Chevrolet car with you?

A. I have no recollection of that; that particularly at the time of the accident would have been a factor but that never never happened.

Q. That never happened? A. No.

Q. Now in reference to the question Mr. Tacke has testified that it was then and there agreed between you and him that the premium on the insurance policy would be paid out of the commission on a real estate deal involving real estate that was referred to your office through Mr. Tacke's activities as he testified, was there anything said between you and Mr. Tacke at that time about paying for any premium [153] of insurance in that way?

A. Nothing.

Q. He also testified that when he told you he was going to take the insurance on the Chevy that you expressed an appreciation of knowing so, did you do any such thing?

A. No, I didn't. I had no knowledge of any insurance until the day of the accident.

Q. Now he spoke about a second conversation with you about this insurance and again after this which I take it on his testimony would be one or two weeks before the accident he said he had a conversation with you on your own home lawn, do you remember a conversation about that time?

(Testimony of Bill Kelly.)

A. Yes, I do.

Q. And you may state to the court whether or not at that time he made any statement in substance and effect that his Chevy would be in driving shape in a few days and that he wished a policy of insurance to eventually issue on this out of your office?

A. I have no knowledge of the '48 Chevy ever being mentioned; that night when he stopped I was mowing the lawn and he did express to me he had been writing insurance with Yeoman especially hail insurance and that he would certainly like when the hail season came up to swing the business over to our office if we would help him with his landscaping, that I naturally being in business encouraged but we did not [154] ever receive any business from Mr. Tacke, nor did we ever license him and that is the only conversation about insurance I can remember prior to the accident and that had relationship only to hail insurance.

Q. Did you ever at any time have a request for insurance on this Chevy from Mr. Tacke, you personally?

A. I personally never have, no.

Q. Now you have indicated to the court that Mrs. Halverson expressed some suspicion about this application on the morning of September 20th, will you state to the court what you understood your duties were in reference to issuing a policy of insurance?

Mr. Angland: Just a minute. We object to that,

(Testimony of Bill Kelly.)

your Honor, as to his understanding what his duties were with reference to the issuance of insurance; we have here an insurance policy that was in fact issued by him, and the answer admits he was authorized to enter into the contract of insurance; we object to any explanation about the matter at all; the facts are undisputed.

The Court: He could show what the custom of his office was as to the matter of issuing policies of insurance under like circumstances; if there was anything there that would be material here.

Q. (By Mr. Hoffman): In the regular course of business in your office [155] how do policies of casualty insurance issue in your office?

A. Either by telephone or in person, which is originally written down with detail on our order blank and from that the policy is typed and mailed, and when necessary Halverson brought it to my attention; she expressed that there was a little excitement in Mrs. Tacke's voice and it brought that question in her mind and she asked me about it. We had no knowledge of any accident and the decision at that very minute was made, if she called up for insurance she's got protection. Now the subject did come up about the excitement and I said, well, I know Mrs. Tacke from many phone calls and I have never met her personally but I do know she is exciteable, I would overlook that and certainly with reference to the back-dating of the policy one day I expressed that I didn't ever think that Leo Tacke would request anything and said, give him certainly the benefit of the doubt.

(Testimony of Bill Kelly.)

Q. And it was your intention then to insure from the time the application was received?

Mr. Angland: Just a minute. Your Honor, now to that we do object. There is a policy of insurance in here; the policy of insurance speaks for itself. The effective date the time the policy became effective is in the policy itself; the company has ratified and confirmed that policy in that form consistently up to this time and we don't believe they should be permitted at this time to attempt to change it. [156]

The Court: Oral testimony would be admissible now to alter the terms of a written instrument.

Q. (By Mr. Hoffman): There was a gentleman named, was it Sterling? A. Yes, sir.

Q. Do you have a man in your office by that name? A. Yes.

Q. What was his duties there or business in your office?

A. He was our real estate salesman, one of our men.

Q. Did he write insurance?

A. No. He brought in a lot of insurance but his job was selling real estate; that is what he liked.

Q. Now there was some testimony by Mrs. Tacke that about September 17th you wanted her father to clean up a property for sale and in connection with that business did she or did she not say to you, Bill, be sure to see that we are insured?

A. Never.

Q. Does Mrs. Halverson have a habit of coming to work at your office, or did she at that time——

(Testimony of Bill Kelly.)

Mr. Angland: Just a minute. Your Honor, we object to testifying what Mrs. Halverson's habits are; they don't tend to prove or disprove any issue in the case.

Q. As to her arrival at the office that morning?

The Court: If he knows when she arrived at the office. [157]

Mr. Hoffman: Yes. Well that is what I am asking.

Q. Do you know what time Mrs. Halverson reported for work in your office?

A. Specifically that morning I can't answer because I was not there but he have a habit——

Mr. Angland: Just a minute. He has answered the question, your Honor. I think that is adequate. We object to any volunteer testimony about the matter.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Hoffman): Do you have a regular opening time for your office?

A. Yes, 9:00 o'clock. If anyone gets there ten minutes to nine they usually have to wait because we have a lot of night work and that is an early start for us.

Mr. Hoffman: You may take the witness.

Cross Examination

Q. (By Mr. Baillie): Mr. Kelly, what was Mrs. Halverson's capacity, what was her job in the agency in September, 1952, what did she do, what was her title?

A. She was in charge of our insurance depart-

(Testimony of Bill Kelly.)

ment and our insurance girl and also secretary-bookkeeper.

Q. She was in charge of the insurance department? [158] A. Yes.

Q. She would have authority to issue and countersign policies of insurance? A. Yes.

Q. I believe you have testified that you did some work with Mr. Tacke, held several conversations with him concerning landscaping and lawns?

A. That is correct.

Q. Work that he did for you? A. Yes.

Q. Do you recall any incidents where there was any soliciting of property for sale or such duties as that for you?

A. There was the one lawn situation which of course in our business we don't pay too much attention to because we will spend as much time with a lawn as we do with a house and at that time they didn't have much consideration involved, I don't recall whether it was listing or buying for a lot but just to be pleasant about it I encouraged it but nothing ever happened; if we can help Leo get a little money for his family, we were going to try to help him.

Q. Mr. Kelly, about that time, September 20, 1952, or immediately previous to that had you had many telephone conversations with Mrs. Tacke?

A. Yes. [159]

Q. And mostly in connection with the landscaping of lawns and so forth?

A. That is exactly.

(Testimony of Bill Kelly.)

Q. And did you initiate all of those calls or were some of them initiated by her?

A. Well I will say 80% of them were initiated by her; we used to hear from her quite frequently.

Q. I believe you testified Mrs. Tacke seemed quite excited on most of those occasions of your telephone calls?

A. Well quite excited I wouldn't say that.

Q. Excited, nervous?

A. Nervous, something on her mind she would call up.

Q. She was a rather high strung person over the telephone, would that be your opinion?

A. I wouldn't say really high strung, just windy.

Mr. Baillie: That is all we have.

Mr. Hoffman: That is all.

Mr. Hoffman: Mr. Angland, do you have in your possession the latter written to Mr. Tacke October 27th, 1952 by Mr. Hirst of the Montana Claims Adjustment Bureau?

Mr. Angland: I think we have such a letter.

Mr. Hoffman: Would you produce it, please?

Mr. Angland: Yes, sir. Yes, here it is.

Mr. Hoffman: Could I please recall Mr. Hirst.

The Court: Yes. [160]

W. D. HIRST

was recalled by defendants and testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please. A. W. D. Hirst.

(Testimony of W. D. Hirst.)

Q. Are you the same Mr. Hirst that just testified? A. I am.

Q. And you do business under the name of Montana Claims Adjustment Bureau, do you not?

A. I do.

Q. Now in reference to this Tacke case I am handing you Defendant's Exhibit No. 18 and I will ask you to state whether or not you can identify that instrument? A. Yes.

Q. Is that your signature to the instrument?

A. That is my signature.

Q. And what did you do with that instrument after you signed it?

A. We mailed that in the usual course of business.

Mr. Hoffman: We offer Defendant's Exhibit No. 18 in evidence.

Mr. Angland: May I inquire of the witness first to see whether or not this would tend to prove any issue in the case? [161]

The Court: Very well.

Q. (By Mr. Angland): Mr. Hirst, at the time you wrote this letter Defendant's Exhibit 18, dated October 27, 1952, had you prior to that time advised the Canadian Indemnity Company that your investigation disclosed that the accident had occurred prior to the issuance of the policy September 20, 1952? A. I believe so.

Q. Well just answer yes or no? A. Yes.

Q. You had? A. Yes.

Q. And after you advised them of that is that

(Testimony of W. D. Hirst.)

when they directed you to write the letter dated October 27, 1952?

A. The Canadian Indemnity Company didn't advise me; H. S. Dotson Company.

Q. Well H. S. Dotson is their General Agent; the action of the General Agent becomes the action of the company; is that the situation?

A. That is the situation.

Q. (By Mr. Hoffman): And this letter was written with the authority of Mr. Dotson?

A. Yes.

Mr. Angland: We have no objection. [162]

The Court: It may be received in evidence.

[See page 212.]

Mr. Hoffman: You may take the witness.

Mr. Angland: No questions.

HIRAM S. DOTSON

was called by defendant and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please. A. Hiram S. Dotson.

Q. Where do you reside?

A. Helena, Montana.

Q. Did you formerly reside in Great Falls?

A. Yes, I did.

Q. When did you begin living in Great Falls, Mr. Dotson? A. '30.

Q. And when did you go to Helena?

(Testimony of Hiram S. Dotson.)

A. '34.

Q. From Great Falls?

A. I went to Butte first for a short time and then to Helena.

Q. And during all that time what business were you engaged in?

A. In the insurance business. [163]

Q. Have you been engaged in the insurance business ever since, Mr. Dotson? A. Yes.

Q. And are you so engaged now? A. Yes.

Q. What relation did you have in '52 with the Canadian Indemnity Company?

A. Well the H. S. Dotson Company, of which I am President, was the General Agent for the State of Montana.

Q. And you may state whether or not this Tacke claim was handled through your office for the Canadian Indemnity Company?

A. We handled all claims for the company.

Q. And I think there has been introduced in this case a letter written by you cancelling the policy, showing you Plaintiff's Exhibit No. 9, you may state whether or not that is your signature?

A. No, that is A. W. Bacon's signature; he is Secretary of the company.

Q. That issued out of your office, did it?

A. Yes.

Q. Were you familiar with this case at the time that issued?

A. I was familiar with it to quite an extent, yes.

Q. Calling your attention to the date of the

(Testimony of Hiram S. Dotson.)

instrument, [164] which is a notice of cancellation of the policy under the terms of the policy, did you at the time this notice was issued have information in your office which led you to believe or did you believe at that time that this accident had actually happened before the policy was applied for?

Mr. Angland: Just a minute. To which we object your Honor and this is an attempt to impeach the last witness. Counsel has just produced a witness who has stated that October 27, 1952, the company directed him to notify Tacke of the cancellation by reason of the fact that he had advised the company; now this is an attempt to impeach Mr. Hirst and we object to any further attempt to impeach their own witness who also was a representative of the defendant company. I wish to call the court's attention to Exhibit 18, its contents is merely as follows:

"In regard to your accident of September 20th and the element of requesting insurance from the agency involved in this matter to inform you that you do not have any insurance policy in effect at the time this loss occurred."

It is not a notice of cancellation of the policy; it was a notice they claimed the policy did not cover that loss is all it was. Now if you will have the reporter read, I think I already asked Mr. Hirst one question concerning that and I said, did the company, and he corrected me and he said, H. S. Dotson Company told him to write that [165] after he had advised them that he had learned

(Testimony of Hiram S. Dotson.)

A. '34.

Q. From Great Falls?

A. I went to Butte first for a short time and then to Helena.

Q. And during all that time what business were you engaged in?

A. In the insurance business. [163]

Q. Have you been engaged in the insurance business ever since, Mr. Dotson? A. Yes.

Q. And are you so engaged now? A. Yes.

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(Testimony of Hiram S. Dotson.)

through investigation that the loss had occurred prior to the ordering of the policy, and if you will have the reporter read the question I propounded to Mr. Hirst, your Honor, I think you will find that is the fact.

The Court: What question was that?

Mr. Hoffman: Maybe I should lay a deeper foundation here. I wanted to close this case by five o'clock and I am getting maybe in too much of a hurry.

The Court: You don't need to close it tonight or hurry it to close because if you have matters to present you have another day.

Mr. Hoffman: I will go back to my question that I withdrew.

Q. When is the first time that you knew or believed that this accident had actually happened before the policy was applied for?

Mr. Angland: Just a minute. Your Honor, again he is asking to impeach the last witness. I think if he is going to contradict, he is asking him when, he is trying to fix a time later than October 27, 1952. It's an attempt to impeach his own witness and another representative of the defendant company.

The Court: It does seem to have a bearing along that line. [166]

Mr. Angland: If the court please, our position is this letter of October 27th, 1952, is not notice of cancellation of the policy particularly under the

(Testimony of Hiram S. Dotson.)

terms of the policy; the policy provides that the company——

The Court: Let me see it.

Mr. Angland: The question I asked Mr. Harrison must be considered with the letter, your Honor.

The Court: Well the effect of it is substantially the same as a cancellation; he says there is no coverage at the time the accident occurred; that is the effect of it.

Mr. Angland: And he said that that was issued by him after he knew and had advised H. S. Dotson Company that the accident had occurred prior to the ordering of the insurance; he says that action was taken by him after that time.

Mr. Hoffman: The case is a little involved and we want the court to have all the facts to make up his decision upon.

The Court: What are you really trying to adduce from this witness in the way of testimony?

Mr. Hoffman: How he happened to issue the notice of cancellation.

Mr. Angland: Your Honor, the notice of cancellation like the insurance policy speaks for itself. I don't think it needs explanation. Has your Honor looked at it? [167]

The Court: Let's see it.

Mr. Angland: Here is the cancellation; I think it speaks for itself.

The Court: What was the date of that letter he just read?

Mr. Hoffman: October 27, 1952.

(Testimony of Hiram S. Dotson.)

The Court: Well this would follow as a natural result of the letter that preceded it and they finally come to the conclusion and cancel it some 2 or 3 months after they had said there was no coverage; that is what it amounts to; they are both in writing and they do speak for themselves. I don't know what more you can bring out in regard to them, they speak for themselves; the letter says there was no coverage at the time the accident occurred and 2 or 3 months later they cancel the policy.

Mr. Hoffman: Under the terms of the policy and later when we got to the case and completed our investigation we tendered the whole premium back on the ground we believed that fraud voided the entire contract from the inception and that under the statute to rescind had sent the rest of the consideration.

Mr. Angland: So they think, your Honor. Mr. Hoffman is proposing to the court they can take all these actions and retain the premium, and then two years later when liability attached to Mr. Tacke by lawsuit then they [168] can rescind; that isn't the law of recission and I am sure your Honor knows it.

The Court: Well you can bring it all up later and I will have to wade through these arguments.

(Question read.)

Mr. Angland: Then I objected, your Honor.

The Court: Well, of course, the written document itself shows they had information in their office, followed by cancellation. I think these two in-

(Testimony of Hiram S. Dotson.)

struments speak for themselves. I don't think they require any amendment or explanation.

Mr. Hoffman: If I may just make this additional remark, please. This case was set up in Mr. Dotson's office by this report of the accident signed by Tacke that the loss occurred at 9:30 in the morning, and the initial setup of this case in his office was that the loss occurred before nine o'clock, and it is a gradual evolution and investigation and discovery of new evidence which finally by the time we wrote the letter cancelling, that it be cancelled for fraud from the beginning, those facts were a little bit slow in accumulation.

The Court: Well you haven't got any fraud in this case; it isn't set up in the pleadings, either way there is none here at all.

Mr. Angland: No pleading of recission either, your Honor. [169]

Mr. Hoffman: The courts in cases speak of fraud in law where they attempt to consider an accident that already occurred; even without the knowledge of the insured they speak of it as a fraud in law.

The Court: Well you can bring that up later. This is no time to discuss it now.

Mr. Hoffman: I believe the court has ruled against your answering the question, Mr. Dotson.

Mr. Hoffman: You may cross examine the witness.

Mr. Angland: No cross examination.

Mr. Hoffman: I would like to inquire of Mrs. Halverson when she made this endorsement.

The Court: All right.

Mr. Hoffman: She says she couldn't remember when she endorsed it.

Mr. Hoffman: I think we will waive that. Since they object to its admission we will waive it.

The Court: Have you another witness?

Mr. Hoffman: I think not.

The Court: Any rebuttal?

Mr. Angland: If the defense has rested, your Honor, if we could have just a moment so I could talk to Mr. Baillie I think we might end this case in a hurry.

The Court: Very well.

Mr. Angland: No rebuttal of plaintiff, your Honor. [170]

The Court: Very well, how much time do you need after the transcript is written up on the first brief?

Mr. Angland: I think we probably better ask the court to allow us 30 days.

The Court: Very well, upon receipt of the transcript you may have 30 days, and the defendant 30 days, and the plaintiff says 20 days to reply.

Mr. Angland: Thank you, your Honor.

Court adjourned at 5:05 p.m. on July 28, 1955.

[Endorsed]: Filed March 14, 1956.

PLAINTIFF'S EXHIBIT No. 1

[Letterhead of Hoffman and Cure.]

June
~~July~~ 11, 1954

Messrs.: Emmett C. Angland
William L. Baillie
521 Ford Building
Great Falls, Montana

Re: Pearl Kissee vs. Leo Tacke

Dear Sirs:

Returned herewith is the copy of the summons and complaint which were delivered to our office a few days ago.

Please take notice that the Canadian Indemnity Company declines to defend this action for the reason that the loss had already occurred when the policy issued and had, in fact, occurred before the policy was ordered out, and for the further reason that we cannot proceed under the reservation of rights which Mr. Tacke has already signed because he refuses to collaborate or cooperate with us, and has given us notice that you are his attorneys in the matter, and have always been his attorneys.

We enclose herewith our check, payable to the order of Leo Tacke, in the sum of $9.83, the balance of the paid premium on the policy. Notice of cancellation of the policy was given by the company under erroneous information that the accident had actually occurred after the policy was ordered out September 20, 1952, and that because

thereof ten days notice of cancellation was necessary.

If you have any objection to the form of tender of the balance of the premium, please advise us and we will return the balance of the premium in legal tender.

The writer has already notified Mr. Tacke.

Very truly yours,

HOFFMAN & CURE,
/s/ By H. B. HOFFMAN.

HBH/map
encl.2
CC—summons & complaint
Check—$9.83

PLAINTIFF'S EXHIBIT No. 2

[Check]

Affiliated With 1st Bank Stock Corporation

93-15/921 No. 824

Hoffman & Cure, Attorneys-at-Law
501-503 First National Bank Building

Great Falls, June 11, 1954

Pay to the Order of Leo Tacke.....$9.83
Nine and 83/100.....Dollars

HOFFMAN & CURE
/s/ H. B. HOFFMAN

To The First National Bank
Established 1886
Great Falls, Montana

[Penwritten "Cancelled" across face of note.]

PLAINTIFF'S EXHIBIT No. 3

[Letterhead of Emmett C. Angland.]

Hoffman & Cure
Attorneys at Law
First National Bank Building
Great Falls, Montana

June 12, 1954

Re: Pearl Kissee vs. Leo Tacke

Gentlemen:

Reference is made to your letter of June 11, 1954.

You advise that the Canadian Indemnity Company declines to defend this action for Mr. Tacke in accordance with the terms of the policy of insurance issued to Mr. Tacke. You state that one of the reasons for declining to proceed is that Mr. Tacke refuses to collaborate or cooperate with you under the reservation of rights which he signed and further that he has given you notice that William L. Baillie, Esquire, and the writer are his attorneys in the matter.

While we have not always been his attorneys as stated in your letter, it has been necessary for us to do considerable work for Mr. Tacke. The Canadian Indemnity Company put Mr. Tacke's driver's license in jeopardy and it was necessary for us to represent Mr. Tacke in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade in a proceeding to correct the injustice attempted to be perpetrated by the Canadian Indemnity Company through the Montana Highway Patrol. The Canadian Indem-

nity Company was fully informed of this proceeding by service of proper documents on the General Agent of the Company by the Sheriff of Lewis and Clark County on June 12, 1953.

You may be assured that if the Canadian Indemnity Company retains you to represent Mr. Tacke as it should do in accordance with the terms of the insurance policy issued to Mr. Tacke, you will find that Mr. Tacke will be glad to cooperate with you and comply with the terms of the policy in every respect so far as he is concerned.

You have enclosed with your letter of June 11, 1954, a check payable to the order of Leo Tacke in the sum of $9.83. You inquire as to whether or not we object to the form of tender of what you state is the balance of the premium. Mr. Tacke paid the full premium in September of 1952. Presumably this $9.83 is the earned premium and now that Mr. Tacke has been sued the Canadian Indemnity Company no longer wishes to retain the earned premium. Mr. Tacke has requested us to return your check. He purchased something for the premium, the thing he purchased is what he wants and he does not propose that either this or any other insurance company can escape its contractual liability when it might be called upon for a loss by simply refunding the premium paid for the coverage.

Your check No. 824 in the sum of $9.83 is returned herewith.

You further advise in your letter "notice of cancellation of the policy was given by the company

under erroneous information that the accident had actually occurred after the policy was ordered out September 20, 1952 and that because thereof ten days notice of cancellation was necessary." This is another attempt by the Canadian Indemnity Company to escape its contractual and legal responsibility in this matter after Mr. Tacke has been sued.

Very truly yours,

/s/ EMMETT C. ANGLAND
Emmett C. Angland.

ECA:la
Enc:

PLAINTIFF'S EXHIBIT No. 7

[Envelope]

3c Cancelled Stamp
Postmarked Great Falls, Mont. 5 P.M. Sep. 20, 1952
The Rocky Mountain Fire Insurance Co.

Bill Kelly Realty
(Formerly Malmberg Agency Since 1900)

Get Results—Call Kelly
No. 7 Sixth Street North
Great Falls, Montana

Addressed to: LEO TACKE
124-20th St. S.W.
Great Falls, Mont.

PLAINTIFF'S EXHIBIT No. 8

[Receipt]

Get Results—Call Kelly Save Your Receipts
Great Falls, Montana, Sept. 22, 1952 No. 1849
Received of Leo Tacke

Thirty Nine & no/100 Dollars.....$39.00
—insurance—

Bill Kelly Realty
/s/ By I. Halverson

Thank you.

PLAINTIFF'S EXHIBIT No. 11

[Letterhead of O. B. Kotz.]

Mr. Leo Tacke December 18, 1952
124 - 20th St. S. W.
Great Falls, Montana

Re: Ed Kissee and wife Auto Accident Damage Claim.

Dear Mr. Tacke:

Mr. Ed Kissee has placed with me for attention a settlement of his claim against you for damages sustained to his car and injuries sustained by his wife when your car collided with his during the latter part of September. He informs me that you were charged with reckless driving and forfeited your bond of $15.00; that the accident was due to your fault, or negligence, and that you offered to make settlement but the same was not satisfactory to

him. The estimated cost of repairs to his car range from $735.00 to $800.00, and he demands payment for the cost of repairs as well as cost of hospital and doctor expenses incurred on account of the injuries sustained by his wife.

He will accept the actual costs of the repair bill, as well as that of the hospital and doctor, if the same is taken care of within the next few days. That is, if you will at least call and agree to make such settlement as is satisfactory to him. This offer of settlement is made without prejudice to his rights and the rights of his wife in the event that you do not accept this settlement and take care of same in a satisfactory manner.

I trust I may hear from you within the next week so that it will not be necessary to institute suit against you.

Yours truly,

/s/ O. B. KOTZ
O. B. Kotz

OBK-d

DEFENDANT'S EXHIBIT No. 12

REPORT OF AUTOMOBILE ACCIDENT

To the Canadian Indemnity Company—Canadian Fire Insurance Company.

Policy issued by Bill Kelly, Agent at Gt. Falls, Mont. Policy No. 22 CA 3908.

1. Name of Assured: Leo Tacke. Date of Policy: 9-20, 1952.

Address — No. 124 20th St. S.W., City of Gt. Falls, State of Mont.

2. Person driving assured's car at time of accident: Leo Tacke. Age: 38 years.

Address— Street, same; City, same; State, same.

Occupation of person driving assured's car: Body repairman. Was he in employment of assured?....

3. Purpose for which car was being used at time of accident: Business. What is his relation to assured?.....

4. Make of automobile: Chevrolet. Year model: 1948. Type of body: 4-dr. sedan. * * * * *

5. Date of accident: September 20, 1952. Hour: 9:30 o'clock a.m. Condition of weather: Good.

6. Place where accident occurred: Road intersection of Sun River bridge (wagon bridge) & county road, Great Falls, Mont.

7. Speed of assured's car: 25 mph. Speed of other car: Unk. m.p.h. Kind of road or pavement: Blacktop.

8. Name of driver of other car: Ed Zeen. Address: 2301 10th Ave. So., City.

9. Make of his automobile: 1935 Dodge. Type of body: Truck. * * * * *

10. Damage to Assured's Car:

Estimated damage $250.00. Nature and extent of damage: Hood, grille, left fender, radiator, right fender, water pump, fan, splash pans.

Name of person who caused damage: Leo Tacke. Address: City.

Is he insured? Yes. Name of insurance company.....

Where is assured's automobile now? At home.

11. Damage to Property of Others:

Estimated damage $200.00. Kind of property and nature of damage: Cab, right side of truck.

If automobile, make of car: 1935 Dodge. Type of body: Truck. Year model.....

Name of Owner: Ed Zeen. Address: City.

Is he insured? Yes. Name of insurance company: State Farm Mutual.

Where is damaged property now? At home.

12. Personal Injuries:

Names of injured persons and addresses:

Mrs. Ed Zeen (in Deaconess Hospital for observation)—Dr. Richardson. Age: I believe about 60.

Leo Tacke, knocked unconscious. Taken to Deac. Hospl.—Dr. Bob McGregor. Age: About 38.

Dickie Tacke, age 12, knocked unconscious. Taken to Deacon. Hospl.—Dr. Bob McGregor. Also, left arm injured.

If medical aid was rendered, give name of doctor: Tacke's—Dr. Bob McGregor. Zeen's—Believe Dr. Richardson, G. F. Clinic.

Where were injured taken? Deaconess Hospital.

* * * * *

14. Explain fully how accident occurred: I was traveling South on 15th St. West which goes down and crosses the old Sun River bridge and intersects a county road. I was traveling at about 25 miles per hour and my son was in the front seat with me. The last I remember we were some 150' from the intersection. The next thing I can remember I was being put in the ambulance and taken to the hospital. I do not remember seeing another car before that or anything else.

15. Names and addresses of witnesses: Ray Bull, age approx. 15 years, 1418 3rd Ave. N.W., phone number 5378. Vane Fisher, boy, age approx. 15 years, Rte. 1 West.

State whether witness was in Assured's car; in other car, or where: In another car. (These two boys were together in a car.)

Date of this Report: 9-24, 1952, at Great Falls, Montana.

/s/ LEO T. TACKE,
Assured.

Defts Ex #13
Case # 1648
Tacke
vs
The Canadian Insurance Company

AUTOMOBILE INSURANCE APPLICATION

BILL KELLY REALTY

Name of Insured Leo Tacke

Address 124 - 20th St W.

Occupation Mechanic or Gen'l

Policy Period: From 9-20-52 to 9-20-53

COVERAGES	LIMITS OF LIABILITY	PREMIUMS
A. Bodily Injury Liability	$ 10,000 each person $ 20,000 each accident	$ 24.00
B. Property Damage Liability	$ 5,000 each accident	$ 11.00
C. Medical Payments	$ 500 each person	$ 4.00
D. Comprehensive	$	$
E. Collision or Upset	Actual Cash Value Less $ Deductible.	$
F. Fire, Lightning and Transportation		$
G. Theft		$
	TOTAL PREMIUM	$ 39.00

Description of automobile:

Year	Trade Name	Model	Body Type	Serial No.	Motor No.
48	Chev.		4 dr.		

Symbol	Cost	Purchased	Encumbrance

Purpose for which automobile is to be used Bus & Pl Ed

Mortgagee Called our office 9:30 A.M.

Agent Office

Insured's Signature

The liability is clearly that of Mr. Tacke and there are rather severe personal injuries involved. We have been dealing with Attorney Kotz for some time and have forestalled the filing of suit. We do not believe we will be able to forestall the filing of suit in the near future.

The Montana Highway Patrol on April 28, 1953, issued a Notice of Security Requirement or Order of Suspension by reason of the accident hereinbefore referred to. The Montana Highway Patrol acted according to advice your Company gave that office to the effect that Mr. Tacke was not covered by insurance at the time of the accident that occurred September 20, 1952.

It became necessary for Mr. Tacke to employ the undersigned to appeal the decision of the Supervisor of the Montana Highway Patrol. Copy of the Notice of Appeal and other pertinent documents were served upon your General Agent, H. S. Dotson Company, at Helena, Montana.

The District Court set aside the Suspension Order of the Montana Highway Patrol. A copy of the order of the District Judge is enclosed herewith.

As the situation now stands suit will probably be filed against Mr. Tacke in the near future. We are at this time calling upon you to extend coverage to Mr. Tacke in accordance with the terms of the policy which you issued to him. We are aware of the fact that there is some claim on the part of

your Company that this policy was secured by misrepresentation. While this is not the fact, even assuming that it were true, it is our view that your Company by issuance of the policy and acceptance of the premium has waived its right to deny the effectiveness of the policy.

You realize that Mr. Tacke is not overlooking the fact that his policy also included medical payments to cover the medical expenses incurred by Mr. Tacke and his child.

We have devoted considerable time to checking into this matter for Mr. Tacke; for conferences with Attorney Kotz, for investigation of this accident, and for our legal research to determine the effectiveness of the policy as well as for the hearing had upon the validity of the policy as issued. A reasonable charge for our professional services to this date would be $500.00. We expect your Company to pay these charges and also to accept coverage under Mr. Tacke's policy.

There are cases to the effect that in a similar situation the attorneys' fees as well as the amount expended to settle a claim when coverage has been denied are proper against the insurance company. You have issued a policy and by the very terms and provisions of the policy and in accordance therewith you effected the cancellation of that policy several months later. We will defer taking any further action in this matter until we hear from you. Due to the seriousness of the claims being

made we must ask that you notify us of your intentions on or before November 15, 1953.

Very truly yours,

WILLIAM L. BAILLIE,
EMMETT C. ANGLAND,
/s/ By EMMETT C. ANGLAND.

ECA:la
Enc.
cc: John J. Holmes,
Insurance Commissioner.

PLAINTIFF'S EXHIBIT No. 15

[Letterhead of The Canadian Fire Insurance Company—The Canadian Indemnity Company.]

Emmett C. Angland
521 Ford Building
Great Falls, Montana

November 2, 1953

Re: Claim No. 102,287. Assured: Leo Tacke. Date of Accident: 9/20/52.

Dear Mr. Angland:

We acknowledge receipt of your letter of October 30th.

This matter has been referred to our general agent for the State of Montana, H. S. Dotson and Company, Granite Building, Helena, Montana.

The attorney representing this Company in this case is Mr. H. B. Hoffman of the firm of Hoffman and Cure, First National Bank Building, Great

Falls, Montana. We suggest you contact Mr. Hoffman regarding this matter.

Yours very truly,

/s/ WINTER DEAN
Winter Dean,
Claims Superintendent.

WD/bs
cc: H. S. Dotson and Company

DEFENDANT'S EXHIBIT No. 16

(Copy)

Police Department—City of Great Falls

Police call [x] Date: 9-20, 1952.

Call from: A lady. Address.....

At 8:24 o'clock a.m. Details: A bad accident north of Feiden's Greenhouse.

Swingley—Chamberlin—ambulance.

Officers assigned: Gray, car #5. Fisher, desk officer.

Report of Officer in Charge of Investigation

Took a Mrs. Pearl Kissee of 909 23rd Street South to the Deaconess Hospital where Dr. Richardson attended her. Also took a Leo Tacke of 124 20th Street Southwest to the Deaconess Hospital and he was attended by Dr. Robert McGregor.

A Dick Tacke, son of Leo Tacke, was taken to the Deaconess Hospital by a Ray Bull of 1418 3rd Avenue Southwest and Vern Fischer of Route 1 West, and he was attended by Dr. Robert McGregor. Accident was investigated by Highway Patrol —Fousek.

/s/ SWINGLEY.

DEFENDANT'S EXHIBIT No. 18

[Letterhead of Montana Claims Adjustment Bureau.]

Mr. Leo Tacke
124 20th Street Southwest
Great Falls, Montana

October 27, 1952

Re: Canadian Indemnity Company & Canadian Fire Insurance Company Policy No. 22 CA 3908—D/A September 20, 1952. Our file 52 868.

Dear Mr. Tacke:

In regard to your accident of September 20th and the element of requesting insurance from the agency involved, please be advised that we have been instructed by the company involved in this matter to inform you that you do not have any insurance policy in effect at the time this loss occurred.

Yours very truly,

MONTANA CLAIMS
ADJUSTMENT BUREAU,
/s/ W. D. HIRST
W. D. Hirst

WDH:eb

[Endorsed]: No. 15704. United States Court of Appeals for the Ninth Circuit. Canadian Indemnity Company, Appellant, vs. Leo Tacke, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana, Great Falls Division.

Filed: August 26, 1957.

Docketed: September 9, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15704

THE CANADIAN INDEMNITY COMPANY,
Appellant,

vs.

LEO TACKE, Appellee.

CONCISE STATEMENT OF POINTS RELIED UPON BY APPELLANT (ANEW)

Appellee sued appellant for an adjudication of the validity of an automobile liability policy and that defendant is liable and obligated in accordance with the terms of the policy,—and for equitable relief. Specifically, that because the policy, by its printed terms, fixes the beginning of insurance at 12:01 A.M. 20 Sept. 1952, an accident occurring prior to 8:24 A.M. that day is covered.

Appellant does not deny, or question, that the policy antedates the accident by approximately eight hours and twenty minutes, but denies coverage of this accident because:

1. Application for this policy was made after the accident occurred between 9:00 and 9:30 o'clock A.M., 20 Sept., 1952, by the appellee's wife, at which time appellee, who was driving the automobile involved when the accident occurred, of necessity knew the accident had occurred. This application was made to Kelly's Insurance Agency, and reduced to writing 9:30 A.M. that day by the employee of that office, Jane Halverson, who accepted the application after she inquired whether an accident had occurred, to which appellee's wife replied, "No." (Tr. 134, L. 9.)

2. Appellant did not know,—appellee did know, —the accident occurred before application for the policy was made and accepted.

3. The testimony of Jane Halverson that just before noon of the day of the accident appellee himself appeared in Kelly's office and reported the accident happened about 9:30 A.M. (Tr. 141, L. 14.)

4. Appellee's signed written report of the accident to appellant states the time of the accident 20 Sept. 1952, hour 9:30 o'clock A.M. (Exhibit 12.)

Our appeal is based upon the "settled rule of Insurance Law that where a loss, occurring before the risk attaches, is known only to the applicant and he obtains a policy without disclosing the fact

of the loss, the policy is void even though the contract be given a date prior to the loss." (Barry, et ux, vs. Aetna Ins. Co., Pa. Sup. Ct., 81 Atl. 2d 551.) At least, the prior risk is not covered by the policy.

That is the defense appellant pleaded. It stands proven and admitted.

Respectfully submitted,

/s/ H. B. HOFFMAN,
/s/ ORIN R. CURE,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 9, 1957. Paul P. O'Brien, Clerk.

No. 15704

IN THE

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellant,

vs.

LEO TACKE,

Appellee.

APPELLANT'S REPLY BRIEF

Appeals from the United States District Court for the District of Montana, Great Falls Division

H. B. HOFFMAN
ORIN R. CURE
Attorneys for Appellant,
502 First Nat'l Bank Bldg.
Great Falls, Montana

Filed ....., 1958

..... Clerk

No. 15704

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No. 15704

IN THE

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellant,

vs.

LEO TACKE,

Appellee.

APPELLANT'S REPLY BRIEF

FINAL CONCLUSION

Appellee's counsel do not even attempt to assail the fundamental principle of insurance law upon which this appeal is bottomed, stated by the supreme court of Pennsylvania in Barry et us vs. Aetna Ins. Co., 81 Atl. 2d 551 as follows:

> "When a loss, occurring before the risk attaches, is known only to the applicant and he obtains a policy without disclosing the fact of the loss, the policy is void even though the contract be given a date prior to the loss."

Our case is not taken out of that law.

Appellee's counsel argue, in the teeth of this principle:

> "There is nothing illegal or wrong in entering into an insurance contract for protection against a loss which may already have occurred, nor is there anything illegal or wrong in issuing a policy and predating said policy." (Appelle's Brief, Page 20)

Section 13-405 of the 1947 Revised Codes of Montana codifies the law, which the adjuster Hirst seems to have had in mind when he issued the notice October 27, 1952 to appellee (Def. Ex. 18 R. 212) that he "did not have any insurance in effect at the time this loss occurred." The writer does not see, under the authorities we have cited, why this policy could not be valid as to losses occurring after the application for the policy was accepted, 9:30 A.M. September 20, 1952, until the policy was cancelled. Section 13-405 of the Montana Codes is identical with Section 1599 of the California Civil Code, under which the California courts go a long way in separating the legal and illegal parts of the contract and give effect to the legal portions (See Kerr's Annotations).

Section 13-405, R. C. provides:

> **"When contract partially void.** Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

Appellee's counsel attempt to circumvent the principle of law upon which we stand by claiming estoppel; that we cannot invoke the law we rely upon be-

cause appellee had a contract to insure prior to September 20th, 1952; and that the matter involved in this appeal is determined against appellant in a "Judgment", given by Judge Speer, and sanctioned by Judge Pray in his opinion (R. 32).

Appellee has not shown estoppel or waiver nor are either available to appellee because against public policy and illegality of appellee's obtaining the policy by concealment of the loss when policy issued.

In the second place, appellee failed to prove a binding contract to insure prior to September 20th, 1952, nor to show estoppel against a claim of insurance prior to September 20th.

Lastly, neither Judge Speer's "Order" (R. 24) nor Judge Pray's "Opinion" or decision (R. 32) adjudicate any issue relevant in this case, nor, are they competent as evidence to any relevant fact.

ESTOPPEL OR WAIVER

It stands admitted, a) that after the accident September 20th, 1952, appellee's wife tried to get a policy dated September 19th, 1952 and tried to get Kelly's office to date the policy September 19th (R. 167, 168). When asked if she had an accident, she said "No." (R. 168); b) appellee appeared in Kelly's office before noon of September 20th and reported that the accident happened at 9:30 (R. 169); c) appellee stated in his Report of Automobile Accident, (Ex. 12, R. 202):

> "Date of accident: September, 20, 1952. Hour 9:30 o'clock A.M."

This written statement was given to Hirst's secretary, put into the "Report" then read over by appellee before he signed it. None of this evidence is questioned in the Record. We argued it in our Brief (p. 8) and appelle's counsel no where has taken issue as to the facts. We, therefore, assume the evidence is not only true but accepted as true by appellee.

No case holds that an insured ever had, or can have, coverage of such a risk as herein involved. It follows that appellee never did have a "right," in the premises. To have a waiver there must be a relinquishment of a known "right" and it implies knowledge of the existence of facts and an intention to forego a "right" which might have been asserted (Griffith vs. Mont. Wheat Growers Ass'n. Mont., 244 Pac. 277). Beginning with Hirst's denial of coverage October 22nd, 1952, and ever since, appellee's claim to coverage for this accident has been denied by appellant. It is inconceivable how appellee has, or could, forego any "right" by the mere fact of delay in either serving notice of cancellation of the policy or return of the entire premium, except possibly appellee's right to have earlier demanded a return of his premium. Appellee shows no adjudicated case where any insured has finally done so.

45 C.J.S. p. 715 states a principle applicable, even where there is no fraud or concealment:

> "Where knowledge of facts authorizing a forfeiture is first acquired by insurer after loss, it may remain silent and passive without losing its right to assert its defense."

This principle is adhered to in Goorberg vs. Western Assurance Co. (Col.) 89 Pac. 130, which, in turn is followed and quoted in Peterson vs. Universal Auto. Ins. Co. (Ida.) 20 Pac. 2d 1016 at p. 1021, as follows:

> " 'The defendant is not in this action seeking to rescind the contract sued upon. It is standing upon the contract, and insisting that under its terms there is no liability. Nor can the mere retention of the premium, after the loss has occurred, and where the liability is steadfastly denied, constitute either a waiver of the defense or an estoppel. To constitute such waiver or estoppel by the action or non-action of the insurer after the loss, it is essential "that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action.'
>
> "In the instant case, as in the case just quoted from, nothing was done by respondent which could have led the appellant to believe that it would not take advantage of the breach of warranty; respondent steadfastly refused to assume responsibility."

In 17 C.J.S. p. 677, we read:

> "Illegality of part of a single consideration or of several considerations for a single promise is fatal."

And on page 679, the author continues:

> "A contract lawful on its face or capable of lawful execution may be enforced by the innocent party despite the unlawful purpose of the other party."

Much could be said in support of Hirst's position, apparently taken under Sec. 13-405 of the Montana Codes in that he did not notice cancellation of the policy in its entirety, merely gave notice of denial

of coverage as to the illegal part. There is nowhere involved loss occurring after acceptance of the application.

At any rate, the cases seem to support the rule stated at 45 C.J.S. pp. 714-5:

> "Where knowledge of facts authorizing a forfeiture is first acquired by insurer after loss, it may remain silent or passive without losing its right to assert its defense although it has been held that it is the duty of the company to manifest its intention promptly to avoid the policy."

The author cites German Fire Ins. Co. vs. Gibbs (Tex.) 92 S.W. 1068 for the latter part of the rule on duty to manifest intention which Hirst very promptly did (Oct. 27, 1952). As we have shown, (opening Br. 17) the Texas courts adhere to the rule that an insurance agent is powerless to issue a policy covering a known loss before the contract of insurance is made and such a policy is invalid, incapable of ratification in Texas (Br. 18). When we later (June 11, 1954) tendered appellee the remainder of the whole premium, we merely washed our hands of Leo Tacke, after appellant had, in the writer's opinion, afforded him full coverage from October 20th, 1952, at 9:30 A.M. until the policy was cancelled. Kelly, even if he intended, could not have covered a loss of over $5,000.00 having theretofore occurred for a paltry premium of $39.00. No State Commissioner of Insurance in the United States would stand for that.

We shall sum the matter up with Northwest Amusement Co. vs. Aetna Cas. & S. Co., 107 Pac. 2d 110

where the supreme court of Oregon states the rule against giving validity to illegal provisions in an insurance policy:

> "The rule of public policy, which prevents a recovery in court upon such an agreement, is not based upon the impropriety of compelling the defendant to comply with his contract. That in itself would generally be a desirable thing. Relief is denied, because plaintiff is a wrongdoer.
>
> "Courts do not wish to aid a man who found his cause of action upon his own immoral or illegal act. *** The court's refusal is not for the sake of the defendant, but because it will not aid such a plaintiff." Id., § 598, p. 1110. *****
>
> "Among others, the following four tests have been applied by the courts in determining whether or not recovery should be permitted upon contracts challenged as illegal. (B.U.L.R. 962, 966.)
>
> (1) Did they aid or tend to aid a result possible of attainment only by an unlawful act, or one contrary to public policy? Ingersoll v. Coal Creek Coal Co., 117 Tenn. 263, 98 S. W. 178, 9 L.R.A., N.S., 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829. (2) Could the plaintiff establish his case without referenye to or reliance upon an illegal act or transaction? McMullen v. Hollman 174 U.S. 639, 19 S. Ct. 839, 43 L.Ed. 1117. (3) Is the contract based upon separate legal consideration? Armstrong v. Toler supra; Holt v. O'Brien, 15 Gray, Mass., 311. (4) What is the evil apprerended if the contract be enforced? Sage v. Hampe, 235 U.S. 99, 35 S.Ct. 94, 59 L.Ed. 147."

Insurance law is a specialty but the Oregon court applied the general law of contracts stated by Justice Holmes in Sage vs. Hampe 235 U.S. 99, 35 S.Ct. 94. 59 L.Ed. 147, as follows:

"A contract that on its face requires an illegal act, either of the contractor or a third person, no more imposes a liability to damages for nonperformance than it creates an equity to compel the contractor to perform. A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. Kalem Co. v. Harper Bros. 222 U. S. 55, 63, 56 L. ed. 92, 96, 32 Sup. Ct. Rep. 20; Ann. Cas. 1913A, 1285. And more broadly, it long has been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit."

Our case transcends mere fraud. Appellee is enmeshed in illegality, and as stated in 17 C.J.S. "Contracts" Sec. 272:

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. . . . The law, in short will not aid either party to an illegal agreement; it leaves the parties where it finds them. The general rule is the same both at law and in equity. Likewise, the general rule is the same whether the contract is executory or executed.

. . . . In such case the defense of illegality prevails, not as a protection to defendant, but as a distability in plaintiff."

The law of waiver or estoppel has no application, there is neither waiver or estoppel to the defense of illegality (17 C.J.S. Contracts, § 279).

Our position is that due notice of disclaimer of liability was given, as was due notice of cancellation of the policy; that the loss having occurred before

appellant knew of the grounds for forfeiture, retention of the premium, or a part of it, does not prevent the defense of forfeiture in appellee of any rights as to such loss. Finally, allowance of appellee's claim in this case is against public policy; that the claim is illegal and that waiver and estoppel has no application.

APPELLANT HAD NOT ENTERED INTO A CONTRACT OF INSURANCE PRIOR TO SEPTEMBER 20, 1952

As we understand appellee's position, it is that nothing more happened September 20, 1952, as to issuance of policy or coverage than Mrs. Tacke's telephone call to Kelly's office "to determine why the insurance policy had not been received," (Br. p. 2) with the inference that Kelly had promised, but neglected to issue the policy prior to September 20th. He leans heavily on Judge Pray's "opinion" (Br. pp. 2, 3) and Judge Speer's order reversing Supervisor Schultz's Order of Suspension of Appellee's license to drive a car. Of Judge Speer's Order, Appellee's counsel says (Br. 7):

> "The determination was that there was insurance in effect at the time of the accident (R. 24). The Order of Judge Speer dated the 30th day of July, 1953 (R. 24) is clear on this point."

As we shall show in the succeeding section of this brief, appellee's counsel is quite in error as to Judge Speer's "determination" of this fact. Frankly, we do not yet know the office or function of Judge Pray's "Opinion" (R. 32) hardly a part of the Record, though incorporated therein (Bowles vs. Dodge, 141

Fed. 2d 969). It cannot be accepted as evidence of its recitals any more than Judge Speer's recitals in this Order. Certainly neither binds anyone nor does either adjudicate anything. Take them out as evidence, appellee stands on his bald statement that Mrs. Tacke phoned to Kelly September 20th "to determine why the insurance policy had not been received." We do not want to be facetious at this point, so have decided to assume appellee's burden of assembling the evidence, none of which appellee's counsel dared to do.

Mr. Tacke related that two or three weeks before the accident (R. 73) at 20th Street and Sixth Avenue South, he was putting in a lawn, where Kelly called and he, Tacke, "advised Mr. Kelly that we would insure the '48 Chevrolet which we were repairing with him" (R. 73). When requested by the Court to state the conversation, Tacke testified (R. 74):

"THE COURT: Yes, state the conversation.

"Q. And what other conversation was there?

"A. I don't understand.

"Q. Was there any other conversation at that time with Mr. Kelly?

"A. About insurance?

"Q. Yes.

"A. Yes, Mr. Kelly had agreed to pay me a commission on any mostly real estate that I listed, especially listings that I brought to his office. We expressed in this conversation that I appreciate this offer as a result of appreciation the policy on this car would be written with him.

"Q. And was there any other conversation then concerning the insurance at that time ?

"A. At present I don't recall it."

A week later, Tacke talked with Kelly on Kelly's front lawn. Tacke had put a lawn on this property and stopped there and Kelly paid him (R. 75, 6). The following is Tacke's testimony of the conversation he had with Kelly, (R. 75):

"Q. And what was the conversation at that time concerning the insurance in question?

"A. That the '48 Chevrolet which we were rebuilding from a wreck I had bought it as a salvage wreck, would be in running, in driving shape very shortly, within a matter of a few days and we were interested to know that he was covering it, and further we made further arrangements on how the policy would be paid.

"MR. HOFFMAN: Just a minute, please. We ask that the conversation be given and not his conclusions as to what was done.

"THE COURT: Yes.

"Q. You stated that you wished a policy of insurance to be issued to be made available, is that what you said?

"A. Correct.

"Q. And what other conversation was there?

"A. I had given Mr. Kelly a party that was interested in buying a lot and they had expressed to me appreciation for service I had rendered them and in return they said—

"MR. HOFFMAN: Just a minute, please. He is go-into a lot of hearsay; the conversation between Mr. Kelly and this witness.

"THE COURT: Yes.

"A. That he would be paid out of the commission on a lot that I was delivering to him for sale.

"Q. And was there any other conversation as such concerning the policy at that time?

"A. I don't recall it."

There is no evidence that Kelly ever sold this lot or than a commission on a sale of it was ever earned or paid.

Mrs. Tacke testified that about September 7, 1952 (R. 110) she had a conversation with Kelly. The record is (R. 111):

"Q. And what was the conversation at that time relative to the insurance contract?

"A. Well, Mr. Kelly called and wanted Leo to go up and give him an estimate on that small lawn he wanted to put in in the back of his rental property and I told Mr. Kelly at that time that Leo would go up and give him an estimate, and I said in appreciation, Mr. Kelly, for your giving us this lawn work we will take out insurance on the 1948 Chevrolet with you.

She also testified about a second conversation, as follows (R. 111).

"Q. Was there any other conversation at that time concerning the insurance?

"A. Well I called the number to the office and one of the salesmen answered.

"Q. At that time or that same day?

"A. No, that same day.

"Q. I already asked as to the first conversation.

"A. And he says, when you are ready that will be fine, is what he told me."

A week later she called Kelly's office on the phone. Concerning this call she testified (R. 111):

"A. It was oh just a few days, possibly a week later I called in to the office in the afternoon when the baby and little boy was both asleep, while it was quiet, to see if I could get hold of Mr. Kelly and one of his salesmen answered the telephone and said he was real busy and I asked him I said I want to find out about some insurance; he said, we are real busy, you will have to talk to Bill about that and hung up, and so I left word for him to call us, at the office to be called; well, I never got the call, It was neevr called back."

Her testimony about a "third" conversation (R. 112) is as follows:

"Q. And you testified there was a third conversation and with whom did you have that conversation?

"A. Well Mr. Kelly called between twelve and one, on a Wednesday, about the 17th.

"Q. 17th of what?

"A. September.

"Q. What year?

"A. 1952. He called because he wanted my dad. My dad had equipment, a little tractor and with this equipment they can clear weeds and do lawn work, and he wanted my dad to go up and clear the weeds and lawns and clear the rubbish off a piece of property he had for sale at about 37th some place and he said, if I can get the weeds cleared off this afternoon, I think I have a sale for it this afternoon before five o'clock. If he could get the weeds and rubbish cleared away from that property. So I assured him I would get hold of my dad

and get him up there. He said, I am awfully busy and the office is full of people, and I said to him, Bill, be sure Leo is covered by insurance, and he says, thank you, goodby, and that was the conversation."

On cross-examination, Mrs. Tacke testified (R. 120):

"Q. Now in all of these conversations to which you have testified did you ever mention to Mr. Kelly in any of these conversations what kind of insurance you wanted on this car ?

"A. I said on the insurance on the '48 Chevrolet liability.

"Q. Did you tell him that you wanted liability insurance ?

"A. That I can't remember.

"Q. Did you tell him how much liability insurance or any kind of insurance you wanted ?

"A. That I don't remember whether I did or not.

"Q. Did you tell him about how much property insurance you wanted at any time; I am talking now about the three conversations which you say you had before September 20th ?

"MR. ANGLAND: To which we object, there isn't anything in the policy to show there is any property insurance in the policy, your honor. We object to the question as not tending to prove or disprove any issue in the case; it is incompetent, irrelevant and immaterial."

Mr. Angland succeeded in blocking any answer to the last question (R. 120).

The "salesman" she referred to and with whom her "second" conversation with Kelly's office was had was Tom Sterling (R. 121), Kelly's real estate

salesman (R. 182), who did not write insurance. (R. 182).

Mr. Kelly testified, as to Tacke's conversation with him two or three weeks before the accident, at 28th Street and Sixth Avenue South, that it was "generally and completely about landscaping; in the conversation I have no recollection about ordering any insurance as Mr. Tacke has testified" (R. 179). He had no recollection of Mr. Tacke saying that when he was ready to insure he would insure the Chevrolet with Kelly (R. 180). Mr. Kelly further testified (R. 179, 180):

"Q. Now in reference to the question Mr. Tacke has testified that it was then and there agreed between you and him that the premium on the insurance policy would be paid out of the commission on a real estate deal involving real estate that was referred to your office through Mr. Tacke's activities as he testified, was there anything said between you and Mr. Tacke at that time about paying for any premium of insurance in that way?

"A. Nothing.

"Q. He also testified that when he told you he was going to take the insurance on the Chevy that you expressed an appreciation of knowing so, did you do any such thing ?

"A. No, I didn't. I had no knowledge of any insurance until the day of the accident.

"O. Now he spoke about a second conversation with you about this insurance and again after this which I take it on this testimony would be one or two weeks before the accident he said he had a converation with you on your

own home lawn, do you remember a conversation about that time ?

"A. Yes, I do.

"Q. And you may state to the court whether or not at that time he made any statement in substance and effect that his Chevy would be in driving shape in a few days and that he wished a policy of insurance to eventually issue on this out of your office ?

"A. I have no knowledge of the '48 Chevy ever being mentioned; that night when he stopped I was mowing the lawn and he did express to me he had been writing insurance with Yeoman especially hail insurance and that he would certainly like when the hail season came up to swing the business over to our office if we would help him with his landscaping, that I naturally being in business encouraged but we did not ever receive any business from Mr. Tacke, nor did we ever license him, and that is the only conversation about insurance I can remember prior to the accident and that had relationship only to hail insurance.

"Q. Did you ever at any time have a request for insurance on this Chevy from Mr. Tacke, you personally ?

"A. I personally never have, no."

Concerning Mrs. Tacke's testimony, as to her conversation with Kelly, he testified (R 182):

"Q. Now there was some testimony by Mrs. Tacke that about September 17th you wanted her father to clean up a property for sale and in connection with that business did she or did did she not say to you, Bill, be sure that we are insured ?

"A. Never."

Mrs. Halverson testified that Mrs. Tacke did not

ask her, September 20th, why Mr. Tack's policy had not come through (R. 167); she wanted Mrs. Halverson to date the policy ~~September~~ yesterday" and then Mrs. Halverson asked her if she had an accident; Mrs. Tacke replied "No." (R. 163).

Concerning Exhibit 13, the application for the policy, Mrs. Halverson testified (R. 166):

"A. We bind coverage by those applications. Sometimes the policy is not written for a day or so even and we don't have time to do everything as it comes in so when the information is put on that form they are covered right at the time."

When Mr. Kelly showed up, Mrs. Halverson was suspicious and testified as to her disposition of the application as follows: (R. 168, 9)

"A. Well when, after he came to work which was, must have been close to ten I laid the application on his desk and told him of the details that the woman was a little fluttered, that she wanted to date the policy the day before and I said, well, what do you think about it, do you think I should write it ? And he said, well, all right. And I said, do you think they had an accident ? He said, of course, not, they wouldn't do a thing like that. So I wrote the policy.

"Q. So you proceeded to write the policy under those conditions to Mr. Kelly directions ?

"A. Yes, sir.

"Q. Did Mr. Tacke call in that forenoon and report this accident ?

"A. No. I believe Mr. Tacke came into the office just before noon sometime.

"Q. Just before noon ?

"A. Yes, and he reported the accident that it happened about 9:30.

"Q. And did you have the policy issued at that time ?

"A. Yes, the policy had been written.

"Q. Issued and signed ?

"A. Yes."

No policy issued until September 20th. The only evidence of an agreement by Kelly to insure is Mrs. Tacke's testimony that Wednesday, September 17th Kelly phoned to her that he wanted her father to clear a lot for sale. In that conversation, she says that she said to him: "Be sure Leo is covered by insurance" and he says, "thank you, goodby." The premium, when and if Kelly insured, was to be paid out of the commission on a lot that appellee had delivered to Kelly for sale (R. 76). No evidence appears whether this lot was even sold, or whether appellee had received his share of the commission for getting the business. There is wholly lacking any evidence of an "application" for this policy or a "promise to insure" before September 20th. We concede that the name of the insurance company possibly need not be agreed upon, but a particular description of the car, kinds and amounts of insurance, and the day the insurance must begin are essential parts of a contract to insure that were never agreed upon or mentioned until the admitted application, September 20th. No insurance by estoppel is shown or alleged. No

policy was written or ordered out until September 20th.

JUDGE SPEER'S "ORDER" and JUDGE PRAY'S "OPINION" ADJUDICATE NO ISSUE HEREIN

It is obvious, it seems that if Judge Speer determined that the policy of insurance was in effect at the time of the accident, as appellee's counsel asserts (Br. 7), the matter pending in the instant case is res adjudicata. This was urged by appellee's counsel before the trial court with the surprising effect that in his Opinion filed May 26, 1956, the trial court actually did say of Judge Speer's order:

> "Honorable James W. Speer, Judge of said court . . . held that the plaintiff, Leo Tacke, was insured at the time of the accident." (R. 33).

The trial judge seemed of the opinion that appellant "was duly notified to appear before Judge Speer" but did not appear. (R. 33.)

We have no evidence, nor is there any, to sustain such position. The Canadian Indemnity Company was never summoned nor subpoenaed to attend the hearing before Judge Speer; nor was it, or could it be, a "party" thereto. That hearing is bottomed upon Section 53-419 of the Montana Codes, which vests the automobile owner aggrieved by an adverse order of the highway supervisor with the right to appeal to the district court within sixty days after the order. This statute provides:

> "Said appeal may be for the purpose of having the lawfulness of any order, decision, or act of the said supervisor inquired into and determined."

Upon certification of the matter to the district court, the court:

> "Shall fix a day for the hearing of said appeal, and shall cause notice to be served upon the supervisor and upon the appellant, and also upon any other parties in interest upon whom service was required under the provisions of this section."

Service under the act was required to be made as follows:

a) "By serving a written notice of said appeal upon the supervisor.

b) A copy of such notice must also be served upon all other parties in interest, if there be any, by mailing the same to said parties in interest to such addressses of such parties as such parties shall have left with the supervisor. If such parties shall have left no address with the supervisor, then no service on such parties shall be required."

So far as the record shows, and as far as the writer knows, appellant never did leave its address with the supervisor. It was, and is, our opinion that whether the policy covered the accident involved was a justiciable issue that could not be determined in any such procedure before Judge Speer, and therefore, the procedure before Judge Speer was of no interest to appellant. The statute prescribes the jurisdiction of Judge Speer as follows:

> "Upon such trial the court shall determine whether or not the supervisor regularly pursued his authority, and, whether or not such findings are reasonable, under all circumstances of the case . . . If the court shall find from all such trial, as aforesaid, that the findings and conclusions of the supervisor are not in accordance with either the facts or the law, or that they ought to be other or

different than those made by the supervisor, or that any finding and conclusion, or any decision, order, act, rule, or requirement of the supervisor is unreasonable, the court shall set aside such finding, conclusion, decision, order, act, rule or requirement of said supervisor, or shall modify or change the same as law and justice shall require, and the court shall also make and enter any finding, conclusion, order or judgment that shall be required, or shall be legal and proper in the premises."

Section 53-419 of Montana Codes provides:

"Supervisor to administer act—appeal to court. (a) The supervisor shall administer and enforce the provisions of this act and may make rules and regulations necessary for its administration and may provide for hearings upon request of persons aggrieved by orders or acts of the supervisor under the provisions of this act.

(b) An executive assistant to the supervisor shall be appointed by the "Montana highway patrol board," subject to and in accordance with sections 31-105 and 31-106, who shall be vested with full power and authority to act for and on behalf of the supervisor in the administration of this act; and who shall perform such other and further duties as shall be prescribed by the Montana highway patrol board. The salary of the executive assistant shall be four thousand two hundred dollars ($4,200.00) per year.

(c) At any time within sixty (60) days after the rendition of any decision or order by the supervisor under the provisions of this act, any party in interest may appeal to the district court of the judicial district of the state of Montana, in and for any county wherein any party in interest may reside, or in which any party in interest which is a corporation may have its principal office, or place of business, and said appeal may be for the purpose

of having the lawfulness of any order, decision, or act of the said supervisor inquired into and determined. The court shall determine whether the filing of an appeal shall operate as a stay of any order or decision of the supervisor. Said appeal shall be taken by serving a written notice of said appeal upon the supervisor, which said service shall be made by delivering a copy of such notice to the supervisor and filing the original thereof with the clerk of the court to which said appeal is taken. A copy of such notice must also be served upon all other parties in interest to such addresses of such parties as such parties shall have left with the supervisor. If such parties shall have left no address with the supervisor, then no service on such parties shall be required. The order of filing and service of said notice is immaterial. Immediately upon service upon said supervisor of said notice, the supervisor shall certify to said district court a complete record of all proceedings had by him with reference to the decision, order or act appealed from, together with all official forms or documents in the possession of said supervisor pertaining to said decision, order or act, and all correspondence and other written matter in the possession of said supervisor pertaining to said decision, order or act, with the clerk of the said district court. Immediately upon the return of such certified matter, the district court shall fix a day for the hearing of said appeal, and shall cause notice to be served upon the supervisor and upon the appellant, and also upon any other parties in interest upon whom service was required under the provisions of this section. The court may, upon the hearing, for a good cause shown, permit evidence in addition to the matter certified by the supervisor to the court, but, in the absence of such permission from the court, the cause shall be heard on the matter certified to the court by the super-

visor. The trial of the matter shall be de novo, without a jury, and upon such trial the court shall determine whether or not the supervisor regularly pursued his authority, and whether or not the findings of the supervisor ought to be sustained and whether or not such findings are reasonable, under all circumstances of the case. The supervisor, and each party in interest, shall have the right to appear in the proceeding. If the court shall find from such trial, as aforesaid, that the findings and conclusions of the supervisor are not in accordance with either the facts or the law, or that they ought to be other or different than those made by the supervisor, or that any finding and conclusion, or any decision, order, act, rule, or requirement of the supervisor is unreasonable, the court shall set aside such finding, conclusion, decision, order, act, rule or requirement of said supervisor, or shall modify or change the same as law and justice shall require, and the court shall also make and enter any finding, conclusion, order or judgment that shall be required, or shall be legal and proper in the premises. Either the supervisor, or the appellant, or any other party in interest, if there me any, may appeal to the supreme court of the state of Montana, from any final order, judgment, or decree of said district court, which said appeal shall be taken in like manner as appeals are now taken in other civil actions to the said supreme court, and upon such appeal, the said supreme court shall make such order in reference to a stay of proceedings as it finds to be just in the premises, and may stay the operation of any order, judgment, or decree of said district court, without requiring any bond or undertaking from the applicant for such stay. When any such cause is so appealed, it shall have precedence upon the calendar of said supreme court upon the record made in said district court, and

judgment and decree shall be entered therein as expeditiously as possible."

This is a serious matter, judgments against persons not made "parties" to the action or proceeding, nor summoned or even subpoenaed to answer as to their rights—deprivation of the opportunity or right to trial by jury.

Art. III Sec. 23 of the Montana constitution provides:

> "The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases and in all criminal cases not amounting to felony, upon default or apperance, or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law. A jury in a justice's court, both in civil cases and in cases of criminal misdemeanor, shall consist of not more than six person. In all civil actions and in all criminal cases not amounting to felony, two-thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all such jury concurred therein."

Under Sec. 93-2301 of the Montana Codes, there is in Montana but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs and under section 93-2302 of our codes, the party complaing is known as plaintiff and the adverse party as the defendant. Under section 93-4905, issues of fact must be tried by a jury, unless a jury trial is waived and under the decisions of the Montana Supreme Court, a party cannot waive his right to a trial by jury ex-

cept by the modes prescribed by statute (Moore vs. Capital Gas Corporation 117 Mont. 148, 158 Pac. 2d 302. Chesman vs. Hale, 31 Mont. 577, 79 Pac. 254). These modes are prescribed in Section 93-5301 of our codes which provides:

> "When and how trial by jury may be waived. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following:
>
> 1. By failing to appear at the trial;
> 2. By written consent, in person or by attorney, filed with the clerk;
> 3. By oral consent, in open court, entered in the minutes."

We heartily agree with Judge Speer's decision that the policy appears valid on its face, but it seems shocking to put the construction upon it that appellee's counsel does. If the validity of coverages of this accident under the policy was then adjudicated, it seems that the instant suit must be dismissed. The exact words of Judge Speer's "Order" are:

> "That the Order of Suspension issued by Glen M. Schultz, Supervisor of the Montana Highway Patrol . . . be, and the same is hereby set aside." (Record 24, 25).

Preliminary recitals in Judge Speer's "Order" are (R. 24) that he examined appellant's policy "which policy appears valid on its face and became effective at 12:01 A.M. September 20, 1952 . . . that the appellant at the time of the accident referred to in the Order of Suspension, to-wit: September 20, 1952, had in

effect an automobile liability policy, valid on its face." Even if these recitals by Judge Speer before the order or judgment reversing the Supervisor's Order of Suspension be dignified as Findings of Fact, they adjudicate nothing. Sec. 93-5305, R.C., entitled, "Facts found and conclusions of Law must be separately stated—judgment on," provides:

> "In giving the decision or making its findings, the facts found and the conclusions of law must be separately stated, and judgment must thereupon be entered accordingly."

A finding of fact by the trial court cannot be considered an adjudication, or used as evidence, unless some other ground can be found for its use than merely that it is a finding of the court.

Galiger vs. McNulty, (Mont.)
260 Pac. 401;

State ex rel Monteath vs. Dist. Court, (Mont.)
37 Pac. 2d 567;

Lewis vs. Lewis (Mont.)
94 Pac. 2d 211;

Stethem vs. Skinner (Ida.)
82 Pac. 451;

Mitchell vs. Insley (Kan.)
7 Pac. 201

The matter is enacted into statute Sec. 93-1001-23 R.C. provides:

> "What deemed adjudged in a judgyent. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

In Galiger vs. McNulty, 260 Pac. at p. 403, the Montana Supreme Court laid down the rule in Montana from time immemorial as follows:

> " 'A judgment does not reside in its recitals but in the mandatory portion of it.' 33 C. J. 1194. 'The decisions or findings of a court, referee, or committee do not constitute a judgment, but merely form the basis upon which the judgments are subsequently to be rendered. A verdict is not a judgment, which may or may not be rendered upon it. The findings are not a judgment any more than is a verdict of a jury. Such findings or decisions amount only to an order for judgment.' 33 C. J. 1052. 'A finding of fact of the trial court cannot be considered an adjudication, or used as evidence, unless some other ground can be found for its use than merely that it is a finding of the court.' Mitchell v. Insley, 33 Kan. 654, 7 P. 201; Stethem v. Skinner, 11 Idaho, 374, 82 P. 451."

Respectfully submitted,
HOFFMAN & CURE
By: H. B. HOFFMAN
ORIN R. CURE
Attorneys for Appellant
502 First Nat'l Bank Bldg.
Great Falls, Montana

Service of the foregoing brief and receipt of three copies thereof is hereby admitted this 7th day of April, 1958.

EMMETT C. ANGLAND
WILLIAM L. BAILLIE
Attorneys for Appellee
Ford Building
Great Falls, Montana

No. 15704

IN THE

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellants,

vs.

LEO TACKE,

Appellee.

APPELLANT'S PETITION FOR REHEARING

Appeal from the United States District Court for the District of Montana, Great Falls Division

H. B. HOFFMAN
ORIN R. CURE
Attorneys for Appellant,
502 First Nat'l Bank Bldg.
Great Falls, Montana

Filed ....., 1958

..... Clerk

No. 15704

IN THE

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellants,

vs.

LEO TACKE,

Appellee.

APPELLANT'S PETITION FOR REHEARING

To the Honorable Circuit Court of Appeal for the Ninth Circuit:

Appellant respectfully petitions for a rehearing and modification of the opinion filed herein July 3, 1958, upon the following grounds:

I

That facts, material to the decision, were overlooked by the court.

II

The decision is in conflict with controlling decisions. Detailed specifications with statement of Appellant's position with authorities is appended and made a part hereof.

H. B. HOFFMAN
ORIN R. CURE
Attorneys for Appellant,
502 First Nat'l Bank Bldg.

No. 15704

IN THE

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellants,

vs.

LEO TACKE,

Appellee.

STATE OF MONTANA }
County of Cascade } ss.

Certificate of H. B. HOFFMAN
of Counsel for Appellant

H. B. Hoffman, on his oath, certifies and doses:

That he is of counsel for appellant and makes this certificate for counsel for the reason that he is the person in charge of and most familiar with the facts and circumstances connected therewith.

That in his judgment this petition for rehearing is well founded and that it is not interposed for delay.

H. B. HOFFMAN

Subscribed and sworn to this 17th day of July, 1958.

ORIN R. CURE
Notary Public for the State of Montana
Residing at Great Falls, Montana
My commission expires June 11, 1959

DETAILED SPECIFICATIONS

Facts overlooked that are material to the decision:

1. That this accident happened prior to 8:24 A.M., 20 September, 1952.

Appellant's Exhibit No. 16 (Tr. 211).

This exhibit was a part of the actual police record, positively identified by its content, as covering the accident in question. Part of the record is:

> "Call from: a lady at 8:24 o'clock A.M. Detail: A bad accident north of Feidens Greenhouse."
>
> "S. Swingley"

Leroy Swingley testified that he was a police officer, desk officer and ambulance driver and signed the report. (Tr. 158). He testified, of his own personal knowledged, that:

> "The report was received at 8:24 A.M. on September 20, 1952," that it is the report of this Tacke accident (Tr. 159).

Clarence Fisher testified that he is the police officer who answered the phone when the call came in; that of his personal knowledge the call actually came in at 8:24 (Tr. 161).

Against this official record, Tacke testified that the accident happened "approximately" 8:40 (Tr. 77). On the next page (Tr. 78) on direct examination by his counsel, Tackle testified that the accident occurred at "8:20 September 20th or 8:40."

Mrs. Dusek, who lived nearby the scene, testified the accident occurred "about 8:30." (Tr. 128).

Since time is of the essence, the court's finding that

the accident occurred "about 8:30" requires most critical re-examination. If the phone call (probally from Mrs. Dusek) actually came to the police at 8:24, the accident must have occurred prior to 8:24. Appellee's "slip" in stating the accident happened 8:20 is probably the exact truth.

Montana has adopted the Uniform Official Reports Act. Section 93-901-1 of Montana Codes, a part of the Act, provides:

> "Official reports admissible as evidence. Written reports or findings of fact made by officers of this state, on a matter within the scope of their duty as defined by statute, shall, in so far as relevant, be admitted as evidence of the matters stated therein."

This is in consonance with Title 28, Sec. 1733 U.S.C.A., and in United States vs. N.W. Airlines, 69 Fed. Suppl. 482, the court said, concerning a report of Civil Aeronautics Authority Inspector, admitted in evidence:

> "But this is not an ordinary memorandum. It is an official report made by an employee of the United States in the performance of his duty and the record is one of the official files and records of the United States Government."

Sec. 93-1001-38, of Montana Codes, in force since 1895, provides:

> "Entries made by officers or boards prima facie evidence. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry."

cf. Smith vs. Armstrong, 121 Mont. 377, 198 P. 2d 795,
McKee vs. Jamestown Baking Co. (Pa.) 198 Fed 2d 551.

Summed up, we have the positive evidence consisting of the police record corroborated by two police officers fixing the time of the accident prior to 8:24 and the testimony of appellee that it was "8:20 or 8:40." Mrs. Dusek places it about 8:30. Mrs. Dusek testifies appellee got out of his car before she telephoned Bison Motors (Tr. 130); Mr. Tacke testifies he was unconscious following the accident and was taken to the hospital in an unconscious state. (Tr. 77). It is trite to say that self interest did not affect the testimony of Mr. and Mrs. Tacke. Under Sec. 93-2001-1 Mont. Rev. Codes, subsection 3, the jury are to be instructed on all proper occasions:

"That a witness false in one part of his tsetimony is to be distrusted in others."

It would seem that the police record fixes the time of accident at 8:20 as Tacke testified (in the alternative).

2. Mrs. Tacke's statement to Mrs. Halverson, 20 September, 1952, in direct response to Mrs. Halverson's inquiry, before the application was accepted, or promise to insure was given, that no accident had happened.

The uncontradicted testimony of Mrs. Halverson (Tr. 168) is:

"Q. (By Mr. Hoffman): Did she (Mrs. Tacke) at that time on that telephone conversation request you to date the policy a day before?

"A. Yes.

"Q. And what did you say to that?

"A. I said, have you had an accident?

"Q. And what did she say?

"A. She said no."

3. Appellee appeared at Kelly's office before noon, Saturday, 20 September, 1952, to report the accident, and stated that the accident happened about 9:30. The policy had been written, but remained in possession of Kelly's agency until sometime after noon when it was placed in a U. S. street mail box directed to appellee. The envelope enclosing the policy is post dated "5 P.M. September 20, 1952" (Tr. 169, and 199, Ex. 7).

4. That appellee's written report of the accident, read over by appellee after it was prepared upon September 24, 1952, in the office of W. D. Hirst, and signed by appellee after he had read it over, stated:

"Date of accident: September 20, 1952. Hour: 9:30 o'clock A.M."

Nowhere in the record is the accuracy of this written instrument as to Mr. Tacke's intended representations questioned (Tr. 202 for Report, 95 for evidence).

THE DECISION IS IN CONFLICT WITH CONTROLING DECISIONS

Where knowledge is possible, one who represents a mere belief as knowledge misrepresents a "fact."

Sovereign Pocohontas Co. vs. Bond
(App. D.C.) 120 Fed. 2d 14;
Pitney Bowes, Inc. vs. Sirkle;
Fidelity & Cas. Co. vs. J. D. Pittman Tractor Co.
(Ala.) 13 So. 2d 669.
Eastern States Pet. Co. vs. Universal Oil Products
Co. (Del. Ch.) 3 Atl. 2d 768;

Restatement 2 Contracts Sec. 470, (1): "'Misrepresentation' means any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. . . . .

"b. . . . An assertion of knowledge when knowledge does not exist is an assertion not in accordance with the facts;" etc.

The uncontradicted testimony of Jane Halverson, who accepted Mrs. Tacke's application September 20, is (Transcr. 168):

"Q. (By Mr. Hoffman: Did she (Mrs. Tacke) at that time on that telephone conversation request you to date the policy a day before?

A. Yes.

Q. And what did you say to that?

A. I said, have you had an accident?

Q. And what did she say?

A. She said no."

This evidence amounts to an assertion or representation not in accordance with the facts, an assertion of knowledge when the knowledge did not exist with knowledge and intent that Mrs. Halverson act upon it to issue the policy. That is Mrs. Tacke's obvious purpose and intent. Statement in the court's opinion that Mrs. Tacke did not then know of the collision

has no relevancy; Mrs. Tacke's statement that the accident had not occurred is a misrepresentation of a fact that was obviously material and acted upon by appellant and voids coverage of this accident.

Mrs. Dusek, appellee's witness, gives testimony that she heard the accident, went to the scene, discovered on the back of Tacke's uniform, "Bison Motors" and called Bison Motors who informed her it must be Leo Tacke (Tr. 129). She went back to the car where Tacke "was unconscious sitting in the car for awhile and then he finally got out and that is when I seen Bison Motors on the back of his uniform." Mrs. Dusek restores Mr. Tacke to consciousness before the ambulance that took him to the hospital arrived. Tacke testifies (Tr. 77) that he was taken to the hospital in an unconscious state.

Mr. Tacke left the hospital and appeared at Kelly's office before noon. The policy had been written but was undelivered and in possion and control of Kelly's office. Appellee, himself, in full control and exercise of his faculties, then and there reported the accident, "that it happened about 9:30." (Tr. 169). Thereafter, Kelly's agency deposited the policy in a street mail box addressed to Leo Tacke in an envelope postmarked 5 P.M. September 20, 1952 (Pl. Ex. 7, Tr. 199).

In the oral argument, it was conceded that, notwithstanding much authority that delivery of a policy was a necessary condition to give effect to the contract, under modern practices, acceptance of the ap-

plication, including description of the vehicle, term of insurance, kinds and amounts of insurance, the contract becomes effective from communicated acceptance of the application, with coverage from the hour of acceptance.

We recognized that marine insurance is the noted exception,—and that gradually companies operating fleets of motor trucks, are obtaining "marine insurance." Policies are given the advantage of such coverage with or without the clause "lost or not lost." We feel that this clause insuring property, "lost or not lost" very materially affects claims on a risk actually "lost" when the policy issues, especially antedated policies.

But we never meant to concede coverage under the facts of the instant case, and respectfully submit that the present decision is not supported by the spare authority cited in the opinion to support it. At the head of our opening brief, we cited

Stipich vs. Metropolitan Life Ins. Co.
277 U.S. 311 (Br. 16),

emphasizing the law that all insurance contracts are contracts "uberrimae fidei". In that case, our Supreme Court said, p. 316:

> "But the reason for the rule still obtains, and with added force, as to changes materially affecting the risk which come to the knowledge of the insured after the application and before delivery of the policy. For, even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is fur-

nishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him. If, while the company deliberates, he discovers facts which make portions of his application no longer true, the most elementary spirit of fair dealing would seem to require him to make a full disclosure. If he fails to do so the company may, despite its acceptance of the application, decline to issue a policy, Canning v. Farquhar, L. R. 16 Q. B. Div. 727—C. Ins. Co. 26 Ga. App. 225, 105 S. E. 720, or if a policy has been issued, it has a valid defense to a suit upon it. Equitable Life Assur. Soc. v. McElroy, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631, 636, 637. Compare Traill v. Baring, 4 De G. J. & S. 318, 46 Eng. Reprint, 941; Allis-Chalmers Co. v. Fidelity & D. Co. 114 L. T. N. S. 433; Compare Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610."

Your present opinion cites, as its foundation, the venerable decision of

McLanahan vs. Universal Insurance Co.
1 Pet. (26 U.S.) 170,

wherein the venerated Justice Story says:

"The next point is the omission of Coiron to communicate information of the loss to his agent, so as to countermand the order for insurance. The contract of insurance has been said to be a contract uberrimae fidei, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose; and that no known loss had occurred, which by reasonable diligence might have been communicated to him. If a party, having secret information of a loss, procures insurance, without disclosing it, it is a mani-

fest fraud, which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud; for under such circumstances, the mixim applies, qui facit per alium, facit per se. His own knowledge, in such a case, infects the act of his agent; in the same manner, and to the same extent, which the knowledge of the agent himself would do. And even if there be no intentional fraud, still the underwriter has a right to a disclosure of all material facts, which it was in the power of the party to communicate by ordinary means; and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void. This doctrine is supported by the Egnlish as well as the American authorities, and particularly by Watson v. Delafield (2 1 John R. 152; 2 Caines' R., 224; 2 John R. 526), where most of the early cases are collected, and commented upon; and it is well summed up by Mr. Phillips, in his treatise on insurance."

Judgment for defendant was reversed because the trial court usurped the functions of the jury. The cause was sent down for retrial. The above rule of law became the law of the case on retrial.

We do not advocate following Justice Story to the

extent of right to countermanding insurance in the interim between acceptance of the application and delivery of the policy obtained without material misrepresentation. If we must, it is with fear and trembling that we follow, as a rule of law, that an agent's innocence can ever take a case out of our major premise, stated succinctly in Barry et ux vs. Aetna Ins. Co. (Pa. Sup. Ct.) (81 Atl. 2d 551). We respectfully submit that the instant case does not come within the decisions upon which your present decision is based because:

a) Mrs. Tackes assertion, a part of her application, that no accident had occurred, when it is now indisputably agreed by all of us that an accident had already occurred is an assertion not in accordance with the facts. Assertion of knowledge when knowledge does not exist is an assertion not in accordance with the facts.—the most material and relevant fact in this case. The question of Mrs. Tacke's innocence is irrelevant, incompetent, and immaterial.

b) Conceding, as we do, that appellee made the false statement before noon, September 20th that the accident happened at 9:30 after Mrs. Tacke's misrepresentation that no accident had occurred before 9:30 it is nevertheless true that Mr. Tacke's false statement was made first before delivery (mailing) of the policy after noon 20 September, and again in his Report of the accident to appellant September 24th. This Report comes within the intendment and requirements of the policy and dishonesty is not irrelevant.

Does any member of this court believe that Tacke's false statements were not made with intent to de-

fraud? Insofar as delivery of the policy remains a material element of the contract of insurance, his first statement is a flagrant fraud, compounded by the second, because made to reap the benefits of his first fraud, and mistatement of his wife.

We cited and relied upon Strangio vs. Consolidated Ind. Co. 9th C.C.A., 66 Fed. 2d 330 knowing full well that it contains dictum tending against us, an inclination to go full length in applying the maritime liability "lost or not lost" to "automobiles" like "vessels at sea" because we believe the law of insurance will always keep within the realms of honesty and enlightened moral policy. In indulging the presumption that men are honest in their testimony, has this court not completely overlooked the law of evidence that where self-interest is involved (buying a claim for over $5,000.00 for $39.00 in this case) it is a matter of deep concern of the court? True, these are days of fleets of automobiles,—also of telephones everywhere and the Mrs. Duseks who do use them.

> In the Strangio case, you said (66 Fed. 2d 334): "The only contract that arose came into existence when the appellee issued the policy; and, since the policy was issued after the loss, the duty to disclose remained with the appellants."

We press the point of appellee's actual fraud notwithstanding the court's too indulgent stress upon his doubtful state of any continued unconsciousness. And he violated the rule in the case most helpful to appellee, Pendegast vs. Globe & Rutgers Fire Insur-

ance Co. (Ct. App. N.Y.) 159 N. E. 183 that he must "use diligence in communicating the fact of the loss to the prospective insurer so that the insurance may not be written." His statement in Kelly's office, 20th of September, entrapped the insurer in the belief that the loss happened after acceptance of the application, but before delivery.

In both El Dia Co. vs. Sinclair and George A. Moore Co. vs. Eagle Star, cited in the footnote to your opinion, the courts especially note that no question of fraud was presented. Merchants Mutual Insurance, (15 Wall. 664, 82 U.S., 21 L. Ed. 146) considers the dilemma of a parol contract based upon parol evidence and a written policy. If appellee stands upon the written policy, he is barred by the courts ruling, which is:

> "On trial it appeared that the plaintiffs, when they renewed the policy of the 15th January, and paid the premium for insurance, knew that the vessel was lost, and that the defendant had no such knowledge or information. It is obvious from that statement, that no action could be sustained on the policy, and that, in point of fact, the taking of such a policy and causing the defendant to sign it under such circumstances, was a fraud."

United States vs. Patrys, 303 U.S. 341 is hardly anologous. It is based upon the War Risk Insurance act and the amended statute was the controlling feature.

In closing, may we please especially stress;

1. Appellant never intended to insure, nor does the policy by its terms insure, "loss or no loss."
2. This application was accepted and the policy was drawn in Kelly's office upon the representation of, and inducement by Mrs. Tacke that no loss had then occurred.
3. Tacke's intended fraud is, in law, actual fraud in his statements 20 September, before noon, before delivery of the policy and Report of accident 24 September that the accident happened 9:30.

While the authorities are split in general insurance decisions as to whether material misrepresentations must be fradulently made (45 C.J.S. p. 173), the author (45 C.J.S. p. 548) states the marine insurance law on this point as follows:

> "Intent. In marine insurance, contrary to the general rule applicable to other kinds of insurance discussed supra § 473 (3), any omissions to communicate a material fact which insured is under an obligation to disclose will vitiate the policy whether such omission is intentional or results from mistake, accident, forgetfulness, or inadvertence; and fraud is not necessary." (cf. Sec. 647, p. 552 of 45 C.J.S.)

May we please suggest that the case should be reheard in banc. We respectfully submit that Mrs. Tacke's misrepresentation that no loss had occurred when she put in the application is obviously material, if not an implied warranty; that Tacke's false statement that the loss actually occurred after the applica-

No. 15704

IN THE

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellant,

vs.

LEO TACKE,

Appellee.

APPELLANT'S BRIEF

Appeals from the United States District Court for the District of Montana, Great Falls Division

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Filed ....., 1958

..... Clerk

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SUBJECT INDEX

JURISDICTION

SPECIFICATIONS OF ERROR

TABLE OF CASES

Jurisdiction (District Court)

a) Diversity of Citizenship;
Amount in Controversy.

The district court had jurisdiction under Title 28, section 1332 U.S.C.A., this being a civil action where the matter in controversy exceeds the sum of $3,000, exclusive of interest and costs, and is between a citizen of Montana and a subject of a foreign state, to-wit, appellee, plaintiff below, is a citizen of Montana, and appellant is a stock Insurance Company with its United States head office in Los Angeles, California and admitted and authorized to do business in Montana with its principal office in said state in Helena, Montana. Its home office is in Winnipeg, Canada. These facts are pleaded, par. I of the complaint (Tr. p.3) and admitted in the answer (Tr. p. 28, a).

Jurisdiction of Appellate Court

The district court filed his Findings of Fact and conclusions of law 19th of June, 1956 (Tr. 40); filed, entered and noted his judgment the same day (Tr. 42). Motion to Amend Findings of Fact, Conclusions of Law and Judgment under Federal rule 52(b) were served and filed 26th of June, 1952. (Tr. pp. 43 to 46). The Order overruling the Motion was filed 27th of June, 1957, with exceptions allowed (Tr. 47). Supersedeas bond was filed and approved 25th July, 1957. Notice of Appeal under Federal Rule 73(a) was served and filed 25th of July, 1957, (Tr. pp. 48, 49). August 22, 1957, the clerk of the district court certified the

record on appeal. It was filed in the appellate court August 26, 1957 and docketed September 9, 1957, (cf. Fed. Rule 73 (g).

Concise statement of points relied upon by appellant (anew) were served and filed September 9, 1957, in the appellate court.

Appellant, in compliance with Federal Rule 75 (a), duly filed in the appellate court, its designation of contents of the record to be contained in the record on appeal.

Appellee's motion to dismiss the appeal for failure to docket the record within forty days from the date of filing the notice of appeal was argued before the court October 21, 1957, on which day, the court denied the motion, conditional that appellant, within ten days of receipt of a statement of estimated cost of printing the transcript of the record, deposit the total cost with the clerk of the court. This condition was duly and fully complied with. By stipulation of counsel dated January 14th, 1958, and permission of court duly given, time for filing appellant's Brief has been extended to 28th of February, 1958.

STATEMENT OF THE CASE

Plaintiff, (appellee) prays judgment as follows:

1. That the court determine, declare and adjudicate the validity of appellant's automobile liability policy and the liability of the appellant thereunder; that the policy was and is a valid contract of insurance as of 12:01 A.M. September 20, 1952, and that the appel-

lant is liable and obligated in accordance with the terms of the policy.

2. That the court award appellee $3,000.00 attorneys' fees and costs.

3. Equitable relief, (Tr. pp. 11, 12).

The only issue involved in this appeal is whether the policy covers the accident involved in this suit. The policy contains the following provision, (Tr. p. 13):

> "Policy period: From September 20, 1952 to September 20, 1953. (12:01 A.M. Standard time at the address of the named insured as stated herein.)"

The words in parenthesis are a printed part of the policy.

The court's Finding of Fact (Tr. p. 39, (5)) and Conclusion of Law (Tr. p. 40, (2)) is, "That the policy was and is a valid contract of insurance, from 12:01 A.M. September 20, 1952 to 12:01 A.M. December 21, 1952," and the judgment is to the same effect (Tr. p. 42).

Appellee pleaded (Tr. 5, par. VI of Comp.) that appellant did December 10, 1952 give appellee notice of cancellation of the policy effective 12:01 A.M., December 21, 1952 in accordance with paragraph 22 of "Conditions" set forth in the policy, adjusted the premium on a prorata basis, and refunded to appellee his prorated portion. Exhibit "B" (Tr. p. 14) is the notice of Cancellation referred to. Appellant answered this allegation (Tr. p. 28, b. and p. 29, c) that the written application for the policy (Tr. 205)

was made and accepted at the hour of 9:30 A.M. September 20, 1952, when appellant agreed to issue the policy; that the automobile accident referred to in the complaint had occurred about the hour of 8:20 A.M. of September 20, 1952, and appellant, alleges in respect, thereof:

> "Said application was accepted and the promise to issue said policy was made without disclosure of that fact to Bill Kelly Realty (the agent who took the application and issued the policy) and without knowledge on the part of said agency or on the part of the defendant that the accident and consequent loss or damage had already occurred when the promise to issue the policy upon said application was made." (Tr. 28)

As to the notice of cancellation, (Ex. "B" Tr. p. 14) appellant pleads (Tr. 29):

> "That said notice was given to the plaintiff under the belief that the policy of insurance covered any and all losses that might have occurred between the time of the acceptance of the application for said policy September 20th, 1952, at 9:30 A.M. and the date designated for cancellation, and alleges in respect thereof that the defendant notified the plaintiff prior thereto that the policy of insurance did not cover the loss referred to in plaintiff's complaint, and which occurred about 8:20 A.M. the morning of September 20th, 1952."

As an affirmative defense, appellant pleads that the accident occurred approximately 8:20 A.M. September 20th, 1952; that application for the insurance was made to Bill Kelly Realty, appellant's agent, 9:30 A.M. the same day. That the fact that said accident occurred and said damages and losses

had been sustained was, in fact, concealed from said Bill Kelly Realty and the appellant until after the Bill Kelly Realty had accepted the application and agreed to issue the policy and that upon October 27, 1952, appellant gave notice to appellee that his policy was not in effect at the time the loss occurred.

It stands admitted that Pearl Kissee filed her suit against appellee May 22, 1954, for damages sustained in the accident; that appellee requested appellant to defend but on June 11th, 1954, appellant refused to defend the suit and tendered to appellee the remainder of the premium which tender appellee refused.

When Hiram S. Dotson, President of H. S. Dotson Company, appellant's General Agent for Montana (Tr. 188) was on the witness stand, we asked him:

> "When is the first time that you knew or believed that this accident had actually happened before the policy was applied for?" (Tr. 190).

Appellee's counsel objected on the ground we were trying to impeach our own witness (Tr. 190). We assigned our reason for the question and when we got to the case and completed our investigation, we believed that fraud voided the entire contract from the inception and that under the statute to rescind, had sent (to appellee) the rest of the consideration (Tr. 192). We suggested to the court that appellee's report of the accident (Tr. 202, Ex. "12") was that the accident occurred 9:30 in the morning; but the initial setup in Dotson's office was that the loss occurred before nine o'clock; that the developing of

the case was a gradual evolution until we cancelled the contract for fraud from the beginning. The court replied:

> "Well you haven't got any fraud in this case; it isn't set up in the pleadings, either way, there is none here at all."

The court ruled against showing when Dotson's office learned that the accident happened before the policy was applied for (Tr. pp. 190 to 193).

ON THE EVIDENCE

The record from Great Falls City police office (Def's Ex. "16", Tr. p. 211) fixes the time of this accident at approximately 8:20 A.M., September 20, 1952. The report of accident was received at 8:24 A.M. This is not contradicted. A woman telephoned.

Application for this policy was taken in Kelly's office by his employee, Jane Halverson. A woman witness, Hester M. Dusek, testified the accident happened "right on our corner" about 8:30 (Tr. 128). She testified she telephoned appellee's wife about the accident "after 9:00 o'clock" between nine and nine-thirty" (Tr. 130).

Witness Jane Halverson takes applications for insurance, writing on the application the type of insurance they want, the vehicle covered, the time the call comes in (Tr. 163-4). She made out the application for appellee's policy from his wife's telephone to her. (Def. Ex 13, Tr. 164 and 165). The exhibit shows the call came at 9:30 A.M. for "policy period from 9-20-52 to 9-20-53." She testified (Tr. 166):

"We bind coverage by those applications. Sometimes the policy is not written for a day or so even and we don't have time to do everything as it comes in so when the information is put on that form they are covered right at the—"

She testifies that it is customary for customers to ask for insurance on the phone, that in the conversation as to the kind of policy, amount and so forth, she makes out the application sheet (Tr. 166). Mrs. Tacke tried to get the insurance policy "dated" the day before (Tr. 167, 168). Jane Halverson responded, "Have you had an accident" to which Mrs. Tacke replied, "No." Mrs. Halverson testified that appellee came into the office just before noon, and reported that the accident happened about 9:30. The policy had been written (Tr. 169).

Appellee called at adjuster Hirst's office September 24th, 1952 and Hirst's stenographer wrote up appellee's Report of Automobile Accident, (Tr. 202, Exhibit "12").

She asked appellee the questions and he gave the information (Tr. 95). He looked it over when he signed it and knew what was in it. It reads (Tr. 202):

"Date of accident: September 20, 1952. Hour: 9:30 o'clock A.M. Condition of weather: Good."

Appellee's wife spun a nebulous story about conversations she had with several people connected with Kelly's office, and with Kelly, prior to September 20, 1952, which might be construed as evincing a willingness to insure the car in question when appellee got ready. Appellee had another Plymouth, licensed, and

used by appellee and insured in 1952 (Tr. 105). The Plymouth involved in this accident was a total wreck, December, 1951, or January, 1952, which appellee was rebuilding, in his spare time (Tr. 104). Tacke did not have title to the car involved at the time of accident, he got title after the accident. (Tr. 103). Appellee had no use of the car before the accident, it was "practically" repaired. We find no evidence of a contract of insurance, or a contract to insure, prior to September 20th, 1957; nor do the Findings of Fact, or Conclusions of law do so.

SPECIFICATION OF ERRORS

Errors relied upon to supoprt this appeal are:

I

The district court erred in Finding of Fact No. 4 (Tr. 38) that the policy of insurance was effective 12:01 A.M., September 20, 1952, and Finding No. 5 (Tr. 39) that the policy "was and is a valid contract of insurance binding upon the defendant for the period . . . from 12:01 A.M. on September 20, 1952 to 12:01 A.M. December 21, 1952, and the defendant is liable and obligated in accordance with the terms of said policy of insurance for the insured period fixed by the defendant 12:01 A.M. September 20, 1952 to 12:01 A.M. December 21, 1952", the latter date being the date fixed for cancellation of the policy by appellee in the Notice of Cancellation (Tr. 15, Ex. "B" of the Complaint). Also in the conclusion of law (Tr. 40) that the contract of insurance was and

is a valid contract of insurance, from 12:01 A.M. September 20, 1952, and a like judgment (Tr. 42) and in awarding to appellee $1,500.00 attorneys' fees evidently based on the Finding and Conclusion that the policy covered the accident involved.

The foregoing assignment of error is based on (a) the concealment by appellee from appellant of the fact known by appellee, that the accident had occurred prior to acceptance of the application for insurance by appellant, (b) the direct representation by appellee's wife, as an inducement to accept the application, that no accident had occurred, and (c) appellee's statement at noon the day of the accident (Tr. 169) and in his report of the accident that it had occurred at 9:30 o'clock that morning (Tr. 168, Mrs. Halverson's testimony of Mrs. Tacke's denial is not contradicted and Tr. 202 Exhibit "12", being appellee's report of the accident dated two days after the accident, September 24, 1952), and (d) appellant's full faith and confidence in appellee (Tr. 168, 169) and belief that no accident had occurred when the application was accepted and when the policy was delivered.

II

Refusal of the court to amend the Findings, Conclusions, and judgment, raising precisely the points relied upon in assignment I.

III

The court's ruling against appellant's attempt to fix the time when H. S. Dotson Co., appellant's gen-

eral agent in Montana, knew or first learned that the accident had preceded acceptance of the application for the policy. The question propounded to Dotson, the president, was:

> "When is the first time that you knew or believed that this accident had actually happened before the policy was applied for?" (Tr. 190).

This question was strongly objected to, when appellant's counsel stated the purpose of the question as follows:

> "Under the terms of the policy and later when we got to the case and completed our investigation we tendered the whole premium back on the ground we believed that fraud voided the entire contract from the inception and that under the statute to rescind had sent the rest of the consideration."

And on page 193 of the Transcript, the record reads:

> "If I may just make this additional remark, please. This case was set up in Mr. Dotson's office by this report of the accident signed by Tacke that the loss occurred at 9:30 in the morning, and the initial setup of this case in his office was that loss occurred before nine o'clock, and it is a gradual evolution and investigation and discovery of new evidence which finally by the time we wrote the letter cancelling, that it be cancelled for fraud from the beginning, those facts were a little bit slow in accumulation."

Mr. Dotson was not permitted to answer.

ARGUMENT

Our conclusion is that the uncontroverted facts shown in our statement of the case, brings the instant case within the rule stated by the Supreme Court of

Pennsylvania in Barry et ux vs. Aetna Ins. Co. 81 Atl. 2d 551, to-wit:

> "Where a loss, occurring before the risk attaches, is known only to the applicant and he obtains a policy without disclosing the fact of the loss, the policy is void even though the contract be given a date prior to the loss."

At least, that particular risk is not covered.

Pearl Kissee, in her verified complaint against appellee (Tr. 16) claims $5,205.45 damages arising out of this accident. Appellee's complaint herein invokes the jurisdiction of this court upon the allegation that the amount involved herein "exclusive of interest" exceeds the sum of $5,000.00 (Tr. 3). Appellee, when he applied to Kelly for this policy, tried and now tries, to force appellant to pay in excess of 5,000.00 for a $39.00 insurance premium on a policy appellee applied for and got with knowledge of the true facts, to-wit: That he tried, and continues to try, to foist a loss which he already had incurred, amounting to in excess of $5,000.00 in consideration of the paltry sum of $39.00 which he paid appellant for the policy. By his fraudulent acts in concealing the prior loss and positive representations, first that the loss had not yet occurred and, near the time of the accident, that it actually occurred at 9:30 A.M., he raised a justiciable issue, and seeks further advantage in the fact that Kelly kept his word, given in good faith, issued the policy and mailed it out after the loss occurred. Mrs. Halverson was suspicious, told Kelly, and asked him:

"Do you think they had an accident."

Mr. Kelly replied:

"Of course not, they wouldn't do a thing like that." (Tr. 168, 169.)

So she wrote the policy under her superior's directions (Tr. 169).

Seven Appleman, "Insurance Law and Practice," sec. 4265, states the rule of law as follows:

"Generally, a policy of liability insurance does not cover an accident occurring before its issuance, even though the loss occurs in the interval between the application for the policy and its issuance."

"If the insured has knowledge of a loss at the time an application for insurance is made, and he conceals such fact, the policy has no force as a binding contract."

In Hansen vs. Cont. Cas. Co., (Wn.) 287 Pac. 894, McNally, a free-lance broker, applied for an accident policy September 9, 1927, and paid part of the premium. Policy was executed September 12th and dated back to September 9th. The accident occurred September 10th and verdict and judgment were given for the plaintiff. On appeal, Chief Justice Mitchell, in writing the opinion, reversing the judgment and remanding the cause with instructions to enter judgment for appellant, notwithstanding the verdict, said:

"Appellant's contention, which we think must be sustained, is that respondent's agent McNally, in procuring the predating of this policy so that on its face it covered a date on which an accident had already occurred, known to respondent's agent, but entirely unknown to the appellant and its agent,

was guilty of conduct that voided the policy as to any liability for such injuries."

Section 40-301, Montana R. C., provides:

"CONCEALMENT, WHAT CONSTITUTES. A neglect to communicate that which a party knows, and ought to communicate, is called a concealment."

Section 40-302, R. C. M., 1947, provides:

WHAT MUST BE DISCLOSED. Each party to a contract of insurance must communicate to the other, in good faith, all the facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty."

Section 40-303, R.C.M. 1947, provides:

WHAT MUST BE DISCLOSED. Each party to a contract of insurance must communicate to the other, in good faith, all the facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty."

Section 40-305, R. C. M., 1947, provides:

"TEST OF MATERIALITY. Materiality is to be determined not by the event, but soley by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

Section 2-113 of our Codes provides:

"Agent cannot have authority to defraud principal. An agent can never have authority, either actual or ostensible, to do an act which is, and is known

or suspected by the person with whom he deals, to be a fraud upon the principal."

The legislature is quite as sensitive on the issue as the courts.

In Western Indemnity Co. v. Ind. Accident Gd., 190 Pac. 27, the Supreme Court of California follows the Montana Supreme Court in holding that a general insurance agent has no authority to insure against loss or destruction of property occurring before the contract of insurance is made. The court said:

> "Whether or not the insurer, under all the circumstances, could have issued a policy which covered the loss—either total or partial—the authorities we have cited sustain the proposition that, unless there is a subsisting contract of insurance when the loss occurs, a general agent, in the absence of express authority, has no power to issue a policy. We think it has been made clear that in this case there was no contract in force at the time of the injury . . . No authority has been cited, and we are aware of none, holding that a general agent, unless specially authorized, may issue a policy for a known loss, where the terms of the contract of insurance had not already been settled upon."

In Strangio, et al. v. Consolidated Indemnity Co., 66 Fed. 2d. 330, the Circuit Court of Appeals, Ninth Circuit, the automobile, with the knowledge of applicant for liability insurance, was involved in an accident between date of application and issuance of the policy, which antedated the accident and the court held that the insurer was entitled to cancellation of the policy. Strangio Bros. were the applicants for insurance. As to the effect of antedating the policy

to include a loss **occurring before the policy issued but after the application for the policy, the court said:**

> "The policy covers only liabilities that were unknown to Strangio Bros. at the time the application for insurance was accepted and the policy was issued. If an accident had occurred between the date that Strangio Bros. applied for the insurance and the date of the issuance of the policy, without the knowledge of Strangio Bros., the policy having been made effective prior to the accident, the policy would have taken effect by relation as of the 18th. Under the California statute, quoted above, the failure to disclose to the insurer that an accident had happened authorized the cancellation of the policy, notwithstanding the fact that Strangio Bros. were not guilty of any intentional wrong in not making the disclosure to the insurance company before the policy was issued."

The following cases accord with the decisions that an agent had no authority to insure property already destroyed or liability for loss already sustained:

Stipich vs. Metropolitan Life Ins. Co.
277 U. S. 311, 72 L. Ed. 895 (life policy)

Strangio vs. Consolidated Ind. Co. (C. C. A. 9th)
66 Fed. 2d 330

Harrison State Bank vs. U. S. Fidel. & Guar. Co.,
(Mont.) 22 Pac. 2d, 1061; and

Royal Indemnity Co. vs. May & Ball (Ky.)
300 S. W. 237

Gandelman v. Merc. Ins. Co.,
90 Fed. Suppa. 472

Mass. Mut. Life v. Cohen
70 Fed. S. 186 (Life)

Royal Ins. Co. v. Smith
77 Fed. 2d. 157

Barry v. Aetna Ins. Co. (Pa.)
81 Atl. 2d. 551 (policy void from inception)

Moffett v. Tex. Emp. Ins. Ass'n (Tex. Civ. App.)
217 S. W. 2d. 142

Trinity Uni. Ins. Co. v. Rogers (Tex. Civ. App.)
215 S. W. 2d. 349

Mass. Bond & Ins. Co. v. Hoxie (Fla.)
176 So. 480

Celina Mut. Cas. Co. v. Baldridge (Ind.)
10 N. E. 2d. 904, rehearing denied,
12 N. E. 2d. 258 (Auto. liability ins.)

Millar v. New Amsterdam Cas. Co.
289 N. Y. S. 599 (auto. lia.)

O. M. Gaudy, Inc. v. N. C. Home Ins. Co. (Wash.)
260 Pac. 257 (theft, auto policy)

Hansen v. Cont. Cas. Co. (Wn.)
287 Pac. 894, supra

Sholunc v. Detroit Fire & Marine Ins. Co. (Wn.)
19 Pac. 2d. 395 (fire)

Mallard v. Hdwr. Indem. Ins. Co. (Tex. Civ. App.)
216 S. W. 2d. 263

In Trinity Universal Ins. Co. vs. Rodgers, (Tex), 215 S. W. 2d. 349, the facts were similar to the instant case. The accident occurred November 11th and November 13th insured had his wife call the insurance agent, resulting in validating a renewal automobile liability policy by a false entry on the agents books, charging the premium. The Texas Court of Civil Appeals says:

"It is well settled, we think, in this State as well, as the country over, that a policy issued after the loss is sustained is invalid and under such circum-

stances an agent would be powerless to issue a policy or enter into an insurance contract binding upon his principal."

Mass. Bond & Ins. Co. vs. Hoxie (Fla.), 176 So. at p. 482, the court quotes Joyce on Ins. (1st Ed.) Vol. 1 p. 159, sec. 99:

"If the delivery be obtained by misrepresentation or fraud, it can have no effect as a binding contract as in case the assured has knowledge of the loss at the time the application is made and conceals the fact."

Millar vs. New Amsterdam Co., 289 N. Y. S. 599:

"An acceptance of the policy under such circumstances would be a fraud upon the defendant and . . . the contract was obviously void."

In Mallard vs. Hdwe. Indemnity Ins. Co. 216 S. W. 2d. 263, Texas Court of Civil Appeals, in considering automobile collision upset policy follows the decision and applies the rules set forth in Alliance Insurance Co. vs. Continental Gen. Co., Tex. Comm. App., which involved fire insurance loss. Both cases adopt the rule:

"If the insurer acts in good faith, but the insured knows of the previous destruction, there is present avoiding fraud." . . .

"A fortiori, ratification (rather adoption) after destruction" is contary to public policy and cannot be enforced.

The Texas Court cites Kline Bros. & Co. vs. Royal Ins. Co. 192 Fed. 378, where Judge Hand says, considering a fire policy:

"The policy at its inception, must be construed as an insurance of a risk, not as a certain agreement

to pay for otherwise, as I have said, the contract becomes absurd."

And in M. F. A. Mut. Ins. Co. vs. Quinn, 259 S. W. 2d. 854, the Kansas City Court of Appeal follows the Mallard case in an automobile policy, and says:

"The general rule is that the property must be in existence when the risk attaches, or the policy is void."

We respectfully submit that on the general issue, the decision should be that the policy of insurance did not cover the damages claimed by the appellee arising out of the accident, about 8:20 A.M. September 20 1952, and that the claim of the appellee for attorneys' fees should be denied, with costs to appellant.

Respectfully Submitted,

HOFFMAN & CURE

By: H. B. HOFFMAN
ORIN R. CURE
Attorneys for Appellant

502 First Nat'l Bank Bldg.
Great Falls, Montana

Service of the foregoing Appellant's Brief and receipt of three copies thereof is hereby admitted this ..... day of February, 1958.

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No. 15705

United States Court of Appeals

For the Ninth Circuit

RICHARD H. CLINTON, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

CHARLES P. MORIARITY,
United States Attorney,

FRANCIS N. CUSHMAN,
Assistant United States Attorney,
Proctors for Appellee United States of America.

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THE ARGUS PRESS, SEATTLE

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United States Court of Appeals
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

STATEMENT OF THE CASE

In his statement of the case the appellant has adopted a portion of the Findings of Fact entered by the Court and has added thereto a summary of his argument to the Trial Court based on his alleged right to a recovery under the terms of the Vocational Rehabilitation Act (29 U.S.C.A. §31, *et seq.*) For its counter-statement of the case, the appellee wishes to adopt by reference herein the Findings of Fact of the Trial Court. For convenience to this Court, these findings may be summarized briefly as follows:

The libelant (appellant), while serving as an officer aboard the PLYMOUTH VICTORY, sustained certain injuries on March 18, 1945. The vessel at the time was operated by Lykes Bros. Steamship Company under a General Agency Agreement with the then War Shipping Administration. The libelant procured competent counsel through whom he made claim for maintenance

and who, on his behalf, filed suit against the Government. On January 6, 1947, while this action was pending, a compromise and settlement of the libelant's claim was effected between his attorney and attorneys representing the appellee. The libelant and his attorney executed a Receipt and Release in return for payment to the libelant of the sum of $4,962.60, and the libelant's suit was dismissed with prejudice. The appellant, after an interval of 8 years, instituted this suit to have the release set aside, for maintenance and cure, and for other relief. The Trial Court found that the Receipt and Release discharged the appellee's obligation to furnish maintenance and cure to the appellant, the release having been signed by the appellant when he was mentally competent and while represented by competent counsel. The Trial Court found that there was no fraud, duress or economic need which influenced the appellant to sign this release and thereupon concluded as a matter of law that the appellant was precluded from any recovery herein. As to libelant's claim under the Federal Vocational Rehabilitation Act, *supra,* the Trial Court found that it had no jurisdiction in Admiralty for such claim and therefore dismissed the same.

SUMMARY OF ARGUMENT

Admiralty has no jurisdiction of claims arising under the Federal Vocational Rehabilitation Act, *supra.* There is no precedent for holding that such claims are of a maritime nature such as to give jurisdiction of the same to a court of admiralty.

In the absence of a finding by the Trial Court that fraud or duress were practiced upon libelant at the time

of signing the release or that he was "overreached," there is no justification for the setting aside of such a release which the appellant freely and voluntarily executed in return for value or consideration.

ARGUMENT

Vocational Rehabilitation Act Claim Properly Dismissed

The popularly entitled Vocational Rehabilitation Act is to be found at 29 U.S.C.A. §31, *et seq.* This Act provides yearly grants-in-aid from the Federal Government to the State Governments "for the purpose of assisting the States in rehabilitating physically handicapped individuals so that they may prepare for and engage in remunerative employment to the extent of their capabilities, thereby not only increasing their social and economic well-being but also the productive capacity of the Nation" (29 U.S.C.A. §31). A careful review of this Act reveals that it deals only with the method of handling the grants, the computation of allotments to the various States, the duration and restriction of payments to the States, the criteria set up for establishment of the plans of the several States and general problems of administration of the Act. Nowhere in the Act is to be found a provision that any individual may make claim of any kind to the Federal Government either under an administrative procedure or in any court in the land, either Federal or State. Since this latter fact is so obviously patent in the Act itself there is no citation of authority to support this conclusion. It is clear from a reading of the Act that all contact by the person seeking vocational rehabilitation is made directly to the States as the States are designated in the Act

to be the agency to make proper disposition of the benefits provided by the Federal monies which are available.

The appellant has made what is perhaps a justifiable error in this phase of his argument by relying solely upon *Buch v. United States* (C.A. 2) 122 F.Supp. 25, 220 F.2d 165. In that case the injured seaman sustained what some of the medical experts described as a total and permanent disability as result of serious brain damge. The Trial Court stated in part (page 27):

> "I accept the opinion of libelant's neurologist that a re-educative rehabilitation is required—one that should have been undertaken earlier—before it can be said with reasonable certainty that libelant has reached the point of maximum possible cure."

The Court then concluded in its finding that a period of rehabilitation was required which it is hoped would enable the libelant to use his right hand more adequately. This opinion and the above excerpt therefrom refer, of course, to physical and medical rehabilitation (customarily given at a Public Health Service facility) to gain use of an injured member. Nowhere in its opinion did the Trial Court refer to the Federal Vocational Rehabilitation Act, *supra.* On appeal, the Second Circuit also referred to a "future rehabilitation program" which was again a reference to the nature of the medical treatment which the expert witnesses described as being necessary. The Appellate Court did not refer to the Federal Vocational Rehabilitation Act, or grant any relief based on this Act.

The Federal Office of Vocational Rehabilitation has promulgated regulations wherein the State Agencies

are directed to assume the responsibility for the determination of the eligibility of the individuals applying for the Agency's services. The Code of Federal Regulations (45 C.F.R. §401.6) states as follows:

> "The State Plan shall provide that, except as otherwise specifically indicated in this part with respect to war-disabled civilians and civilian employees of the United States disabled while in the performance of their duty, the State Agency will assume responsibility for the determination as to the eligibility of individuals for vocational rehabilitation, and as to the nature and scope of rehabilitation services to be provided to such individuals, and that this responsibility will not be delegated to any other agency or individual, not of the State Agency Staff."

The pocket Title supplement of the Code of Federal Regulations (January 1, 1957, 45 C.F.R., §401.14) states:

> "The State Plan shall describe the policies and methods which the State Agencies will follow in determining the eligibility for promulgation of rehabilitation services in each case."

Nowhere in the Code of Federal Regulations or in the Vocational Rehabilitation Act, *supra,* itself is to be found any procedure for a claimant to appeal from a denial of eligibility by a State Agency, to any Federal administrative agency or to any court, either State or Federal. The libelant could not therefore set forth in his libel any statute or regulation giving this Court appellate review of a refusal of either the California Board, the Washington Board or the Federal Agency to provide him vocational rehabilitation. Obviously,

Federal legislation designed to give rehabilitation to men injured in industry, even if while at sea, is not a maritime matter and is not properly brought in an Admiralty Court.

No Grounds Established to Invalidate Release

A review of the cases dealing with the problem of the validity of seamen's releases indicates that the great majority of cases reported are those in which the negotiations terminating in the purported release were between the seaman personally and the steamship company or its representatives. We have been unable to find any case in which a release was held to be invalid where in the execution of which the seaman was represented by counsel, as in the case at bar.

This Court reviewed the rules referrable to the determination of the validity of a seaman's release in *Blake v. Chamberlin & Co.* (C.A. 9) 176 F.2d 511, 1949 AMC 1591. The Court referred to and approved the instructions given to the jury by the Trial Court on this question. These instructions required the jurors to determine whether the seaman had been fully advised of his rights under the Jones Act, whether he had been fully advised of his rights to future maintenance, and whether the settlement made was fair in all respects. Judge Stephens set out the instructions at length and then stated (page 513):

> "The instructions given the jury show clearly that it was apprised of the seaman's rights and we quote liberally from them in the margin. Garrett v. Moore-McCormack Co., Inc., 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239; United States v. Johnson, 9 Cir., 160 F.2d 789, reversed on other grounds sub

nom., Johnson v. United States, 333 U.S. 46, 68 S.Ct. 391, 92 L.ed. 468."

In the case at bar the libel fails to allege any of the above invalidating factors in the negotations resulting in the release and further, the libelant himself sets forth the fact that he was at all times properly represented by counsel and that the settlement was accomplished between the attorneys representing libelant and attorneys representing respondent. In his trial memorandum (Aps. 30), the appellant states:

> "Libelant admits that he had counsel. John Geisisness (sic), who advised him to take the settlement, and sign the release, and give notice that he did so, notwithstanding the fact that he was totally disabled and would be for an indefinite future time. Libelant admits that he signed the release without fraud, duress, need, distressed conditions which precipitated need of money settlement."

This Court previously considered the validity of a seaman's release in *United States v. Johnson* (C.A. 9) 160 F.2d 789. Judge Orr set forth and followed the rule on the validity of releases as contained in *Garrett v. Moore-McCormack,* 317 U.S. 239, 63 S.Ct. 246, 87 L.ed. 239, wherein it is stated that the burden is upon the one who sets up the release to show that it was executed freely and without coercion or misunderstanding. Judge Orr then reviewed the facts in the case wherein it was clear that the seamen *was not represented by counsel* and *had not consulted an attorney* prior to his interview with the claims attorney for the insurance company, the latter a man of some many years' experi-

ence. Principally because of this fact and the seaman's lack of legal representation, this Court found that that particular release was invalid.

In *Stetson v. United States of America* (C.A. 9) 155 F.2d 359, this Court stated the rule that the Trial Court's findings should not be disturbed unless clearly erroneous. Judge Mathews stated:

> "There is no merit in appellant's argument. The findings are supported by substantial evidence, are not clearly erroneous and hence should not be disturbed. The evidence did not warrant a finding that the release was executed without good and sufficient consideration. Upon the facts found, the Court correctly concluded that the release was valid, and that appellant was not entitled to recover any sum whatever of appellees or either of them."

Lack of counsel was a substantial element in the invalidating of a release in *Thompson v. Coastal Oil Co.,* 119 F.Supp. 838, 221 F.2d 559 (C.A. 3), 352 U.S. 862. The United States Supreme Court *per curiam* opinion affirmed the Trial Court's finding that the seaman's lack of legal assistance contributed to the invalidity of the release.

In *Sitchon v. American Export Lines, Inc.* (C.A. 2) 113 F.2d 830, certiorari denied, 311 U.S. 705, 61 S.Ct. 171, 85 L.ed. 458, the seaman was represented by an attorney of his own choice and signed the release in question upon the advice of his counsel. The release was upheld, the Second Circuit Court of Appeals stating (p. 832):

> "If such a settlement as the one in the case at bar is voidable, no release by a seaman could ever be

> free from attack, if he subsequently discovered that his injuries were greater than he anticipated when executing the release."

The Federal District Courts have followed the rules as set down in the *Garrett, Blake* and *Sitchon* cases, *supra*. In *McGraw v. States Steamship Company* (D.C. N.D. Cal. S.D.) 116 F.Supp. 446, Judge Harris acknowledged the burden placed upon the party pleading the release but in conclusion stated (page 447):

> "In summation, both parties bargained at arm's length, understood the transaction, made no effort to overreach and concluded their dealings with what both believed to be a fair settlement. Under these circumstances it is not proper for the court to set aside the release. Johnson v. Andrus, 6 Cir., 119 F.2d 287; Blake v. W. R. Chamberlin & Co., 9 Cir., 176 F.2d 511; Sitchon v. American Export Lines, 2 Cir., 113 F.2d 830."

Thus the above release was upheld even though the seaman was *not represented by counsel* and dealt only with the claims agent of the steamship company.

There being no transcript of the testimony at the trial available to this Court in the Record on Appeal, this Court can only affirm as correct the Trial Court's findings of fact. In these findings the Trial Court stated that the release was read and understood by the appellant, was signed by him at a time when he was mentally competent, that he was then represented by competent counsel and that there was no fraud, duress or economic need which influenced the appellant to sign the release. Since these findings must be taken as correct for the purpose of this appeal, the appellee re-

spectfully submits that the foregoing authorities, when applied to the facts of this case, clearly indicate the correctness of the action of the Trial Court.

CONCLUSION

The appellee respectfully submits that the Trial Court was correct in holding that an Admiralty Court has no jurisdiction of a claim under the Federal Vocational Rehabilitation Act and that the release voluntarily executed by the appellant, when at all times represented by counsel, was valid in all respects.

Appellee prays that the action of the Trial Court be affirmed.

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Assistant United States Attorney,

Proctors for Appellee United States of America.

BOGLE, BOGLE & GATES,

ROBERT V. HOLLAND,

Of Counsel for Appellee United States of America.

No. 15710

United States
Court of Appeals
for the Ninth Circuit

JACK SHOWELL and DOROTHY SHOWELL,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—11-13-57

No. 15710

United States
Court of Appeals
for the Ninth Circuit

JACK SHOWELL and DOROTHY SHOWELL,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Respondent:

EARL C. CROUTER, Esq.

Nov. 16 1954 Reassigned to Judge Tietjens

Tax Court of the United States

Docket No. 48153

JACK SHOWELL, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DOCKET ENTRIES

1953

Apr. 30—Petition received and filed. Taxpayer notified. Fee paid.

May 1—Copy of petition served on General Counsel.

May 27—Answer filed by General Counsel.

May 27—Request for hearing in Phoenix, Arizona, filed by General Counsel.

June 5—Notice issued placing proceeding on Phoenix, Arizona calendar. Service of answer and request made.

Sept. 24—Hearing set Nov. 30, 1953, Phoenix, Ariz.

1953

Dec. 2—Hearing had before Judge Withey on the merits. Petitioner's oral motion for leave to file amendment to petition in docket 48154—granted. Docket Nos. 48153 and 48154 consolidated for trial. Briefs due 3/2/54; Replies due 4/1/54.

Dec. 21—Transcript of hearing 12/2/53 filed.

1954

Feb. 23—Brief filed by taxpayer. 3/2/54 copy served.

Mar. 1—Brief filed by General Counsel.

Mar. 22—Reply brief filed by petitioner. 3/23/54 copy served.

Dec. 16—Findings of fact and opinion filed. Judge Tietjens. Decision will be entered under Rule 50. Copy served 12/16/54.

1955

Jan. 24—Agreed computation filed.

Jan. 26—Decision entered. Judge Tietjens. Div. 1.

Mar. 9—Petition for review by United States Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

Mar. 9—Proof of service filed.

Mar. 9—Designation of contents of record on review with proof of service acknowledged thereon, filed by taxpayer.

Apr. 12—Order extending time to 6/7/55 for filing the record and docketing the appeal, entered.

1955

May 6—Transcript of original record sur petition for review sent Clerk United States Court of Appeals, Ninth Circuit.

1956

Dec. 3—Mandate from United States Court of Appeals, 9th Circuit, that case is hereby remanded for further proceedings, filed.

Dec. 10—Order that proceeding is placed on the Washington, D. C. calendar of 1/23/57 with leave to parties to submit computations on or before said date, entered. 12/11/56 served.

1957

Jan. 2—Motion to conform judgment to findings with attached memorandum in support, filed by petitioner. 1/9/57 served.

Jan. 8—Hearing set Jan. 23, 1957, Washington, D. C. on petitioner's motion. 1/9/57 served.

Jan. 23—Hearing had before Judge Tietjens on petitioner's motion to conform judgment to findings. Further proceedings under Mandate. Held CAV.

Jan. 28—Motion of Jan. 2, 1957 is denied. 1/29/57 served.

Jan. 31—Memorandum findings of fact and opinion filed, Tietjens, J. Decision will be entered under Rule 50. 2/1/57 served.

Apr. 17—Motion for entry of decision under Mandate, with attached recomputation, filed by respondent.

1957

Apr. 19—Hearing set on respondent's motion 5/22/57, Washington, D. C. 4/22/57 served.

May 22—Hearing had before Judge Murdock on respondent's motion for decision under Mandate. Referred to Judge Tietjens.

May 27—Decision entered, Judge Tietjens, Division 1. 5/28/57 served.

July 11—Petition for review by United States Court of Appeals, Ninth Circuit, with assignments of error filed by petitioner.

July 18—Proof of service filed.

July 18—Designation of contents of record on review with proof of service thereon, filed by petitioner.

[Title of District Court and Cause.]

PETITIONERS' BRIEF

[Clerk's Memo: Excerpt from petitioners' brief filed February 23, 1954.]

Petitioners' Request for Findings of Fact

Petitioners request the Court to find the following facts:

1. Jack Showell, hereafter called Showell, was engaged in the business of booking bets on football, basketball, and baseball games during 1949 (Tr. 26, 27).

2. During 1949 Showell did not accept any bets on horse races (Tr. 27).

3. The manner in which the business was carried on is as follows:

Bettors could place a bet on either of two teams participating in a baseball, basketball, or football game at odds of six against five. In other words, the bettor was required to bet six dollars in order to win five dollars. Thus, petitioner Showell would make one dollar if one person bet six dollars on one team while the other person bet six dollars on the other team. This was so because the winner received only eleven dollars while the petitioner had collected twelve dollars. Therefore, Showell could not lose as long as there was an equal amount of money bet on each team. In an effort to keep the money bet on each team as nearly equal as possible, "point spreads" were utilized. This meant that one team might be made the favorite by several points. Thus, if Michigan was a seven point favorite over Minnesota, the person betting on Michigan could not win unless Michigan won by more than seven points. The man betting on Minnesota would win if Michigan won by less than seven points. If the score was 14-7, both bets were off, and each bettor received his money back. The element of risk to Showell was introduced only when more money was bet on one team than the other. In that event, either the winnings would be greater or the losses would be larger. As long as bets were evenly placed, Showell had to make 8.3% profit (Tr. 26, 27, 28).

4. Showell gave no receipts or tickets of any kind to bettors during 1949 (Tr. 28).

5. The reason for this procedure was that about 90% of the bets were taken over the telephone from people known to Showell (Tr. 28).

6. When a wager was made, Showell recorded it either on an individual piece of paper or a tally sheet (Tr. 28, 29).

7. Tally sheets were used for individuals who made several bets at a time (Tr. 29).

8. Both the individual slips of paper and the tally sheets were retained for two or three months after the game had been played or until all claims had cleared (Tr. 75, 75).

9. After the game was over, the individual slips and tally sheets were examined for winners and losers (Tr. 28, 29).

10. Each winning bet was marked with a circle, and the amount to be paid to that bettor marked on the slip (Tr. 28).

11. Each losing bet was marked with an "X" (Tr. 28, 29).

12. At the end of the day or week depending on whether it was football season or not, Showell and Houston L. Walsh totaled the amounts to be paid to all winning bettors and the amounts lost by all losing bettors (Tr. 28, 29, 30, 88, 89, 90, 91, 92, 93).

13. If the total of amounts lost by bettors exceeded the total of amounts to be paid to winning bettors, the difference was recorded under a column entitled "Gain" (Tr. 29, 30, 31, 33).

14. The recording was made on a sheet of yellow tabular paper entitled "Sports—1949" (Tr. 30, 31).

15. If the total of amounts to be paid to winning bettors was larger than the total of amounts lost by losing bettors, the difference was recorded under a column entitled "Loss" (Tr. 28, 29, 31).

16. This recording was also made on the same

sheet of yellow paper entitled "Sports—1949" (Tr. 30, 31).

17. The entries from January 1, 1949 to December 7, 1949 were made by Houston L. Walsh (Tr. 31, 89).

18. The entries from the "December 1st Rent" note through the balance of the year were made in by petitioner Jack Showell (Tr. 31).

19. The amounts recorded by petitioner Jack Showell and Houston L. Walsh were obtained in the following fashion:

Petitioner Showell would read out the amount won on each winning bet from each slip of paper or tally sheet to Houston L. Walsh who added them up on an adding machine. The same procedure was used for the losing bets. When both totals were obtained, Houston L. Walsh traded places with Showell so that Walsh read out the amount of each winning bet, and then the amount of each losing bet to Showell who would then operate the adding machine. In this fashion the total of winning bets and the total of losing bets were double-checked. (Tr. 30-31, 89, 90, 91, 92, 93.)

20. The six following items appear in the "Loss" column which did not represent net losses from a particular day or week's wagering operations: (Ex. 3).

21. On December 1st, Showell entered $125.00 as rent paid in the "Loss" column (Ex. 3; Tr. 33, 34).

22. On December 14th, he recorded $39.40 in the "Loss" column as an amount paid to Western Union for ticker services (Ex. 3 & 4; Tr. 34).

23. On December 22nd, Showell recorded $60.00 in the "Loss" column paid to Athletic Publications for receiving official odds on games. (Ex. 3, 5; Tr. 35).

24. On December 22nd, Showell recorded in the "Loss" column $100.82 to the Mountain States Telephone Co. for telephone service (Ex. 3, 6; Tr. 36).

25. The above four items total $345.22 which when subtracted from the total appearing in the "Gain" column of $22,908.99 results in $22,563.66. One half of $22,563.66 or $11,281.83 is the amount of additional income assessed by the respondent against each of the petitioners in this case (Ex. 1, 2, 3; Tr. 15, 16).

26. On December 31st, Showell recorded an item in the "Loss" column of $2,447.50 representing uncollected bets at the end of 1949 which had already been recorded in the daily and weekly entries during 1949 (Ex. 3; Tr. 37).

27. On December 31st, Showell recorded an item in the "Loss" column of $1,350.00 representing an uncollected bet from C. E. Leech which had already been recorded in the daily and weekly entries during 1949 (Ex. 3; Tr. 43, 44).

28. The above two entries in the "Loss" column were necessary because the amounts had previously been considered a part of the winnings of specific days or weeks (Tr. 37, 43).

29. Petitioner Showell's original permanent record of net gains and losses from wagering operations during 1949 showed that the total of those

days when there was a net gain was $22,908.88 and the total from those days when there was a net loss was $23,489.97 resulting in net loss from the business of $581.09 for the year 1949 (Ex. 3).

30. Respondent used the amount of $22,908.88, or only the total of amounts recorded on petitioner Showell's record for those days when there was a net gain, as the basis for computing a deficiency and subtracted from it $345.22 of expenses (Ex. 1, 2; Tr. 11, 15, 16, 21, 22).

31. Respondent refused to accept petitioner Showell's original record insofar as all of the amounts appearing under the "Loss" column are concerned with the exception of a total of $345.22 of expense allowed (Ex. 1, 2; Tr. 16).

32. Respondent's agent, H. L. Mende, testified as to the reason why the action was taken as follows:

Q. "Mr. Mende, would you explain to the Court why the figures appearing in the 'Loss' column in Exhibit 3 were disallowed or rejected as proper losses from gambling operations?

A. They were not substantiated as to who they were paid to and, of course, gambling losses were not to be allowed in excess of the gains. We were not able to determine how much money was earned by commissions and how much was lost by wagering, and they wanted to test it out whether proper records should be kept in the case. (Underscoring supplied)

Q. Were any of the gains or losses used in computing the 'Gain' column substantiated?

A. No more than the losses." (Tr. 18).

33. Therefore, respondent accepted as proper and accurate the method of accounting used by petitioner on those days in which a net gain resulted, but rejected the same method of accounting on those days when net losses were sustained (Tr. 11, 15, 16, 18, 21).

34. Exhibit 3 was made available to respondent during his examination, and it was in fact the record which served as the only basis of respondent's deficiency (Ex. 1, 2; Tr. 11).

35. Showell forwarded his permanent record entitled "Sports—1949" to his accountant at the end of 1949 (Tr. 32).

36. Petitioner Showell realized a net loss from wagering operations for the year 1949 of $581.09 (Ex. 3, Entire Record).

37. Petitioner Showell did not earn additional income of $22,563.66 from wagering operations in 1949 (Entire Record).

Argument

The issue in these cases is whether during the taxable year 1949 petitioner Jack Showell had an income of $22,563.66 from the business of booking bets on baseball, basketball, and football games. Petitioners feel that a negative answer is necessary in view of the record herein.

Summary of Relevant Facts

Jack Showell, a resident of Phoenix, Arizona for twenty-three years, was engaged in the business

of booking bets on baseball, basketball, and football games during the year 1949. He did not take bets on horse races. The manner in which the business was conducted is as follows:

Bettors could place a bet on either team at odds of six against five. This means that a bettor would be required to bet six dollars to win five dollars. Thus, the person booking the bet would make one dollar if one individual bet six dollars on one team and another bet six dollars on the other team. This was so because the winner was paid only eleven dollars while the loser received nothing. Consequently, anyone booking a bet could not lose as long as there was an equal amount of money bet on each team. In an effort to keep the money bet on each team as nearly equal as possible, point spreads were utilized. This meant that one team might be made the favorite by several points. Thus, if Michigan was a seven point favorite over Minnesota, a person betting on Michigan would not win unless Michigan won by more than seven points. If the resulting score was 14 to 7, there would be a cancellation of the bets and each bettor would get his money back. The element of risk was introduced when more money was bet on one team than the other. When this happened, either the winnings were greater or the losses larger.

When a bet was made with petitioner Jack Showell during 1949, no receipt or ticket of any kind was given to the bettor. The reason for this procedure was that about 90% of the business was done over the telephone with people known to peti-

tioner. After the wager was made, Showell recorded it on a slip of paper. Occasionally, several bets of one individual were recorded on one tally sheet. After the game, the slips and tally sheets were examined for winners and losers. Each winning bet was marked with a circle, and the amount to be paid to that bettor noted on the slip or tally sheet. Losing bets were marked with an "X". At the end of the day or week depending on whether it was football or basketball season, petitioner and Houston L. Walsh totaled the amounts to be paid to winning bettors and the amounts lost by losing bettors. If the total of amounts lost by bettors exceeded the total of amounts to be paid to winning bettors, the difference was recorded as a "Gain" on a sheet of tabular paper. On the other hand, if the total of amounts to be paid to winning bettors was larger than the total of amounts lost by losing bettors, the difference was recorded as a "Loss" on the same sheet of paper. The net gains appeared under a column entitled "Gain" while the net losses fell under a column designated "Loss".

The only exceptions to the above procedure came under the "Loss" column for December 1st, 14th, 22nd, and 31st. On the first three days, amounts of expense were recorded while $3,797.50 ($2,477.50 plus $1,350.00) of uncollected bets were recorded on December 31st. The entries of December 31st were necessary because these uncollected winnings had already been recorded earlier in the year when the bets were won. Each of the individual bet slips and tally sheets were retained for a few months un-

til the winning bettors had been paid, and then they were discarded.

At the end of the taxable year 1949 petitioner Showell forwarded the tabular sheet showing the net gains and net losses for each day or week to his firm of accountants. This sheet of tabular paper entitled "Sports—1949" remained in the hands of petitioner's accountants.

Petitioner reported no income from the business of booking bets during 1949 because the yearly total of the daily and weekly net gains was $22,908.88 and the total of the daily and weekly net losses was $23,489.97. The difference or $581.09 represented a net loss for the year.

Both deficiencies arise from the fact that respondent has accepted the amounts appearing in the "Gain" column as being correct, but has disallowed all but four items appearing in the "Loss" column. The result is that the total of the amounts in the "Gain" column or $22,908.88 less $345.22 of expense ($125.00 of rent plus $59.40 to Western Union plus $60.00 to Athletic Publications plus $100.82 to the Telephone Company) or $22,563.66 was found by respondent to be additional income to petitioner and his spouse.

It should be especially noted that the same record or sheet of tabular paper was considered as completely accurate by the Commissioner insofar as net gambling gains were concerned, but wholly rejected as far as net gambling losses were concerned. In other words, the Commissioner used petitioner's record as the basis for its deficiency

on the theory that the entries were correct for those days when a net gain resulted, but refused to accept the same record when a day or week resulted in a net loss.

[Title of Tax Court and Docket Nos. 48153-4.]

BRIEF FOR RESPONDENT

Preliminary Statement

This is a proceeding for redetermination of a deficiency in income tax of the petitioners as follows:

Docket No.	Year	Tax	Deficiency
48153	1949	Income	$3,946.65
48154	1949	Income	$4,065.69

The hearing was held before Judge Graydon G. Withey in Phoenix, Arizona, on December 2, 1953. On motion the two dockets herein were consolidated by order of the Court. The evidence consists of oral testimony and exhibits taken at the hearing. March 2, 1954, was set by the Court as the date for filing of simultaneous opening briefs and April 1, 1954, as the date for reply briefs.

Question Presented

1. Whether petitioners are entitled to deduct certain sums allegedly representing wagering losses under section 23 (h), Internal Revenue Code.

Statutes and Regulations Involved

Internal Revenue Code:

"Sec. 23. Deductions from gross income.

* * * * *

"(h) Wagering Losses.—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions."

* * * * *

"Sec. 54. Records and special returns.

"(a) By Taxpayer.—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

"(b) To Determine Liability to Tax.—Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return, render under oath such statements, or keep such records, as the Commissioner deems sufficient to show whether or not such person is liable to tax under this chapter."

* * * * *

Regulations 111:

"Sec. 29.23(h)-1. Wagering losses.—Deductions for losses from wagering transactions are allowed only to the extent of gains from such transactions. In the case of a husband and wife making a joint return, the combined losses of the spouses as a result of wagering transactions shall be allowed to the extent of the combined gains of the spouses from such transactions."

"Sec. 29.54-1. Records and income tax forms.—Every person subject to the tax, except persons whose gross income (1) consists solely of salary,

wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1. Every organization exempt from tax under section 101 but required by section 54(f) to file an annual return shall keep such permanent books of account or records, including inventories, as are sufficient to show specifically the items of gross income, receipts, and disbursements, and such other information as is required by section 29.101-2. The books or records required by this section shall be kept at all times available for inspection by internal-revenue officers, and shall be retained so long as the contents thereof may become material in the administration of any internal-revenue law.

"Income-tax forms shall be prescribed by the Commissioner and shall be executed and filed in accordance with these regulations and the instructions on the form or issued therewith.

"The provisions of section 54(f) relieving certain specified types of organizations exempt from tax under section 101 from filing annual returns do not abridge or impair in any way the powers and authority of the Commissioner provided for in other provisions of the Internal Revenue Code to

require the filing of such returns by such organizations. For further regulations regarding proof and establishment of right to exemption from tax, for filing of returns and keeping records by organizations exempt from tax, see sections 29.101-1 and 29.101-2.''

Respondent's Request for Findings of Fact

1. Petitioners are husband and wife, citizens and residents of the State of Arizona. Their separate individual tax returns for the year 1949 were filed with the Collector of Internal Revenue for the District of Arizona.

2. During the year 1949 petitioners had several income producing businesses and interests (Tr. 25, 80), and petitioner Jack Showell, who shall hereinafter be referred to as the petitioner, was a man of long business experience and considerable financial means. (Tr. 25; Pet. Ex. 9). Petitioner kept regular and permanent books and records of the operation of all such businesses and interests (Tr. 80), except wagering transactions on sporting events (Pet. Ex. 3; Tr. generally).

3. Petitioner's method of accounting for the results of wagering transactions was to record on slips of paper the essential facts of each wager, to add up the day's wins and losses and record the excess only of gains or losses opposite the date. (Tr. 28-33). The original slips of paper and other sheets were destroyed (Tr. 32, 59), and the only permanent record retained was the entry of such final results of each day's betting (Ex. 3).

4. Although requested by respondent to furnish records of gains and losses, with names and addresses of wagerers (Tr. 62, 71), petitioner furnished nothing more than the single sheet showing the final results of each day's transactions (Tr. 64, 72, 73) and testified that it would be impossible to furnish the identity of wagerers.

5. Respondent requests the Court to find the following ultimate facts: That petitioner did not keep regular, adequate and permanent books and records in respect of wagering transactions and has failed to prove the amount of losses therefrom.

Argument

I.

The petitioners are not entitled to deductions claimed for alleged gambling losses, under section 23(h), Internal Revenue Code.

Petitioner had business activities and interests in addition to his wagering transactions and in consequence had an obligation to maintain permanent books of account of the wagering transactions so as to permit respondent to determine his correct tax liability therefrom. (Reg. 111, Sec. 29.54-1). Petitioner did keep regular and permanent books of account for all of his activities other than gambling. The reason for this exception is obviously that he considered it of doubtful legality. The names and addresses of bettors were carefully avoided. The intended result is that petitioner's records of wagering transactions are not susceptible to investigation. It is impossible to audit the meager records kept by petitioner. The respondent

cannot determine his correct tax liability from the records furnished by the petitioner. Unless this petitioner and all others in like situation can be put to their proof of alleged losses which they wish to offset against gambling gains, they enjoy a position of favor on tax day that no regular and legitimate businessman can attain. The undesirability of this result is expressed very well by the Court of Claims in the case of Harry V. Johnson v. The United States (1941) 94 Ct. Cls. 345, 39 F. Supp. 103, 27 A.F.T.R. 563. The petitioner freely admits that it is impossible for him to identify and verify the items which constitute his gambling gains and losses and his proof of losses is confined to testimony that the final tabulation of gains and losses for each day's transactions was correct when made. This does not constitute proof of either gains or losses. It is self-serving and adds nothing more to the tax return itself.

Conclusion

It follows that the determination of the Commissioner of Internal Revenue should be sustained.

/s/ DANIEL A. TAYLOR,
Chief Counsel, Internal Revenue Service.

Of Counsel: Woolvin Patten, Acting Regional Counsel, E. C. Crouter, Associate Appellate Counsel, R. E. Maiden, Jr., Assistant Appellate Counsel, Clayton J. Burrell, Special Attorneys, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed March 1, 1954.

T. C. Memo. 1957-22

Tax Court of the United States

Jack Showell, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Dorothy Showell, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 48153, 48154. Filed January 31, 1957.

W. Lee McLane, Jr., Esq., for the petitioners.
Earl C. Crouter, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

Tietjens, Judge: The respondent determined deficiencies in the income tax of the petitioners for 1949 as follows:

	Docket No.	Deficiency
Jack Showell	48153	$3,946.65
Dorothy Showell....	48154	4,065.69

These deficiencies resulted from the respondent's determination that each of the petitioners realized income of $11,281.83 from wagering operations during 1949.

On petition to this Court we held in Jack Showell, 23 T.C. 495, that the respondent should have allowed a deduction of an additional $3,000 for wagering losses.

The case is again before us on remand from the United States Court of Appeals for the Ninth Circuit, Jack Showell and Dorothy Showell, 238 F. 2d 148, (rehearing denied), for further proceedings

on the "ground that the findings were not sufficiently definitive." We therefore make the following:

Findings of Fact

The petitioners are husband and wife and filed their separate income tax returns for 1949, prepared on the community basis, with the collector for the district of Arizona.

In their returns for 1949 the petitioners reported income from interest, from a partnership, and rental income from a building. No income was reported from, or loss deducted with respect to, any wagering operations.

During 1949 Jack Showell, sometimes referred to as the petitioner, received money from booking bets on baseball, football and basketball games. No receipts or tickets were given for money placed on bets. The petitioner did not keep regular, adequate and permanent books and records of his wagering transactions.

Petitioner had unreported income from wagering operations in 1949 amounting to $19,563.66.

Opinion

In determining the deficiencies herein the respondent determined that the petitioner had income of $22,536.66 from wagering operations in 1949, one-half of which was taxable to each petitioner. On the other hand, petitioners allege in their petitions that the gambling transactions in that year resulted in a loss of $2,046.26.

As indicated by the opinion of the Court of Ap-

peals herein, the burden is on the taxpayer to sustain by competent evidence his claimed deductions. In other words, it is petitioner's burden to prove error in the respondent's determination, the effect of which was to disallow claimed gambling losses.

To sustain that burden the petitioner relies almost exclusively upon his own testimony and that of his accountant. They told the Court in some detail how the gambling operations were carried on and described the records they kept. But the only record introduced in evidence was Exhibit 3, a single sheet of yellow foolscap, which was as follows:

SPORTS—1949

	Gain	Loss
January 1	$ 3,950.00	—
September 17	—	$ 882.50
" 24	—	97.10
October 2	3,469.35	—
" 8	—	6,571.95
" 9	686.00	—
" 15	—	1,363.60
" 22	3,211.00	—
" 29	—	2,026.00
November 5	3,767.55	—
" 13	—	4,346.50
" 19	1,079.70	—
" 20	—	1,241.10
" 27	402.60	—
December 3	1,016.73	—
" 3	—	450.00
" 5	20.00	—
" 6	43.00	—
" 7	21.00	—
" 1 Rent	—	125.00
" 9	510.00	—
" 10	—	274.50
" 11	570.00	—

SPORTS—1949

	Gain	Loss
December 12	372.00	—
" 13	—	902.00
" 14 W. U.	—	59.40
" 14	164.80	—
" 15	153.15	—
" 16	—	705.00
" 17	584.00	—
" 18	—	487.00
" 19	859.00	—
" 20	796.00	—
" 21	96.00	—
" 22	31.00	—
" 22 A. P.	—	60.00
" 22 Tele.	—	100.82
" 23	1,106.00	—
" 31	—	2,447.50
" 31 Leech	—	1,350.00
	$22,908.88	$23,489.97
		22,908.88
		581.09

The petitioner and his accountant testified that the figures appearing on this sheet were arrived at by adding together for a particular day the amounts to be paid winning bettors as shown on the original betting slips and tally sheets and then balancing against this the total amount of losses for that day taken from the same sources. The total of wins or losses for the day was thus obtained and that total was entered on the sheet for each day shown thereon.

Aside from Exhibit 3 the petitioner maintained no account or record with respect to money received by him in his betting transactions or the sums paid out to winning bettors during the year.

The original slips or tally sheets on which bets were noted at the time they were made were destroyed. None of the original betting slips or tally sheets were ever furnished to the revenue agents and neither the respondent nor this Court has had any way of testing the accuracy of the totals appearing on the foolscap sheet unless we accept as wholly true the testimony of petitioner and his accountant that every actual gain or loss was correctly entered thereon.

However, as the Court of Appeals points out "the fact triers had the right to disbelieve Jack Showell and his close office associate, Walsh. Similarly, they have the right to remain unconvinced, to retain an abiding doubt, and to rule against the petitioner." The Court of Appeals also states that if the fact trier "thinks that the taxpayer did suffer losses much smaller than claimed, but did suffer some losses the taxpayer cannot complain if the fact finder selects a half arbitrary, half intelligent figure for the losses."

On this record we are unconvinced that the petitioner suffered wagering losses to the extent claimed. We believe, however, that he did suffer some losses in addition to those allowed by the respondent in his determination and our finding of fact as to unreported income reflects that belief. In effect, it allows the petitioner losses in the amount of $3,000 more than determined by the respondent.

This is a fact case and what we have decided is necessarily limited to the facts before us. The evidence is unsatisfying and though the result may

to some extent be speculative, that is the fault of the record as made almost exclusively by the petitioner and his close associate and "is not fatal". Cohan v. Commissioner, 39 F. 2d 540, 544.

Decision will be entered under Rule 50.

Served and Entered February 1, 1957.

Tax Court of the United States
Washington

Docket No. 48153

JACK SHOWELL, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the opinion and mandate of the United States Court of Appeals for the Ninth Circuit, remanding this proceeding, Memorandum Findings of Fact and Opinion was filed January 31, 1957, and respondent's Motion for Entry of Decision filed April 17, 1957, was placed on the calendar of May 22, 1957. There was no appearance by or on behalf of petitioner at the May 22, 1957 hearing. Upon consideration thereof, it is

Ordered and Decided: That the motion is granted. And it is

Further Ordered and Decided: That there is no

deficiency due from or overpayment due to the petitioner for the calendar year 1949.

Entered May 27, 1957.

[Seal] /s/ NORMAN O. TIETJENS,
Judge.

Served and Entered May 28, 1957.

Tax Court of the United States
Washington

Docket No. 48154

DOROTHY SHOWELL, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the opinion and mandate of the United States Court of Appeals for the Ninth Circuit, remanding this proceeding, Memorandum Findings of Fact and Opinion was filed January 31, 1957, and respondent's Motion for Entry of Decision filed April 17, 1957, was placed on the calendar of May 22, 1957. There was no appearance by or on behalf of petitioner at the May 22, 1957 hearing. Upon consideration thereof, it is

Ordered and Decided: That the motion is granted. And it is

Further Ordered and Decided: That there is no

deficiency due from or overpayment due to the petitioner for the calendar year 1949.

Entered May 27, 1957.

[Seal] /s/ NORMAN O. TIETJENS,
Judge.

Served and Entered May 28, 1957.

[Title of Tax Court and Docket No. 48153.]

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Jack Showell, the petitioner in this cause, by W. Lee McLane, Jr. and Nola McLane, his counsel, hereby files his Petition for the Review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States, entered on May 27, 1957, T. C. Docket No. 48153, determining no deficiency due from or overpayment in Federal income tax due to the petitioner for the calendar year of 1949 and respectfully shows:

I.

Jurisdiction

The petitioner on review, at the time of filing of this petition, is a citizen of the United States and resides at 352 East Palm Lane, Phoenix, Arizona. The return of income tax in respect of which the

disputed tax liability arose was filed by the petitioner with the Collector of Internal Revenue for the District of Arizona, located in the City of Phoenix, Arizona, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The petitioner files this petition pursuant to the provisions of Section 7482 and 7483 of the Internal Revenue Code of 1954.

II.

Nature of Controversy

The controversy involves the proper determination of the petitioner's liability for Federal income tax for the calendar year of 1949.

During 1949, the petitioner maintained a written daily and weekly record on one large sheet of columnar paper of his net gains or net losses realized or sustained from his business of booking bets on football, basketball and baseball games. This written record showed a yearly net loss from wagering of $581.09. Such amount of $581.09 was obtained by deducting the total of recorded net gains in the sum of $22,908.88 from the total of recorded net losses in the amount of $23,489.97. Respondent accepted the accuracy of each daily or weekly entry reflecting a net gain, which entries totaled to the above sum of $22,903.88. At the same time, respondent rejected the accuracy of each daily or weekly entry reflecting a net loss, except four (4) expense item entries totaling $345.22. The result was the issuance by respondent of separate statu-

tory notices of deficiency determining that petitioner and his wife each had additional income of one-half of $22,563.66 (the yearly total of recorded daily and weekly net gains of $22,908.88 minus the $345.22 of expense items). In other words, respondent based his statutory notices of deficiency, which alleged additional income, on the truthfulness of petitioner's written record, but at the same time he wholly denied the truthfulness of the same piece of paper when an entry had the effect of reducing income. The issue was whether petitioner and his wife realized additional income of $22,-563.66.

The Tax Court in an officially published regular opinion filed December 16, 1954, upheld the respondent, in effect, by determining that the alleged additional income of $22,563.66 should be reduced by $3,000.00 to the sum of $19,563.66. The findings of fact made by the Tax Court consumed seven typed pages containing 1496 words found in twelve separate paragraphs.

Subsequently the petitioner filed a Petition for Review of Decision by the United States Court of Appeals for the Ninth Circuit after the matter had been submitted on briefs and oral argument. On October 10, 1956, U. S. Circuit Judge Chambers issued a majority opinion while U. S. Circuit Judge Pope wrote a dissenting opinion. The majority opinion remanded the case to the Tax Court "on the ground that the findings were not sufficiently definitive."

Thereafter, in a memorandum opinion not officially published but filed on January 31, 1957, the Tax Court reached the same conclusion it had arrived at in its earlier regular opinion filed December 31, 1954. However, the findings of fact made by the Tax Court occupied slightly more than one-half of one typed page and contained one hundred and twenty-three words found in four paragraphs.

III.

Assignments of Error

The petitioner assigns as error the following acts and omissions of the Tax Court of the United States:

1. The Tax Court erred in that its findings did not comply with the opinion of the United States Court of Appeals for the Ninth Circuit remanding the case for more definitive findings of facts.

2. The Tax Court erred in finding as fact that petitioner did not keep regular, adequate and permanent books and records of his wagering transactions while at the same time sustaining respondent's determination of income which was not based on any method of reconstructing income as required by Section 41 of the Internal Revenue Code of 1939.

3. The Tax Court erred in refusing to allow petitioner to introduce evidence respecting his net worth and disbursements in view of its finding of fact that he did not keep regular, adequate and permanent books and records.

4. The Tax Court erred in treating as evidence the general presumption of correctness which attaches to the Commissioner's determination.

5. The Tax Court erred in that its decision is not supported by the evidence, is clearly erroneous, and is not in accordance with law.

Wherefore the petitioner prays that the decision of the Tax Court of the United States be reviewed by the United States Court of Appeals for the Ninth Circuit.

/s/ W. LEE McLANE, JR.,
/s/ NOLA McLANE,
Attorneys for Petitioner on Review.

[Endorsed]: T.C.U.S. Filed July 11, 1957.

[Title of Tax Court and Docket No. 48153.]

NOTICE OF FILING PETITION FOR REVIEW

To: John P. Barnes, Acting Chief Counsel, Internal Revenue Service, Washington, D. C.

You are hereby notified that the petitioner did, on the 11th day of July, 1957, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of said Court heretofore rendered on May 27, 1957, in the above entitled case. A copy of the petition for review as filed is hereto attached and served upon you.

Dated: July 12, 1957.

/s/ W. LEE McLANE, JR.,
/s/ NOLA McLANE,
Attorneys for Petitioner on Review.

Acknowledgment of Service Attached.

[Endorsed]: T.C.U.S. Filed July 18, 1957.

[Title of Tax Court and Docket Nos. 48153-4.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 13, inclusive, constitute and are all of the original papers as called for by the "Designation of Contents of Record on Review", in the cases before the Tax Court of the United States docketed at the above numbers and in which the petitioners in the Tax Court have filed petitions for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court cases, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 29th day of July, 1957.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the United States.

[Endorsed]: No. 15710. United States Court of Appeals for the Ninth Circuit. Jack Showell and Dorothy Showell, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed: September 3, 1957.

Docketed: September 13, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15710

JACK SHOWELL, et ux,
Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINTS UPON WHICH PETITIONERS INTEND TO RELY AND DESIGNATION OF SUPPLEMENTARY RECORD

Come now petitioners, Jack Showell and Dorothy Showell, and cite the following points upon which

they intend to rely for reversal of the judgment of the Tax Court:

1. The Tax Court erred in that its findings did not comply with the opinion of the United States Court of Appeals for the Ninth Circuit remanding the case for more definitive findings of facts.

2. The Tax Court erred in finding as fact that petitioners did not keep regular, adequate and permanent books and records of their wagering transactions while at the same time sustaining respondent's determination of income which was not based on any method of reconstructing income as required by Section 41 of the Internal Revenue Code of 1939.

3. The Tax Court erred in refusing to allow petitioners to introduce evidence respecting their net worth and disbursements in view of its finding of fact that they did not keep regular, adequate and permanent books and records.

4. The Tax Court erred in treating as evidence the general presumption of correctness which attaches to the Commissioner's determination.

5. The Tax Court erred in that its decision is not supported by the evidence, is clearly erroneous, and is not in accordance with law.

The petitioners designate the following portions of the record as certified by the Tax Court to the Court of Appeals for the Ninth Circuit on August 30, 1957, as necessary for a consideration of the

points upon which they intend to rely, and to be printed in a Supplementary Record:

Documents:

Docket Entries #48153 (1).

Pages 6 through 16 of petitioners' brief filed 2/23/54 (3).

Brief for respondent (4).

Memorandum findings of fact and opinion 1/31/57 (5).

Decision #48153, 5/27/57 (6).

Decision #48154, 5/27/57 (7).

Petition for review #48153 (8).

Proof of service #48153 (9).

Designation of contents of record on review #48153 (12).

Dated this 11th day of September, 1957.

McLANE & McLANE,
/s/ By NOLA McLANE,
Attorneys for Petitioners.

Affidavit of Mailing Attached.

[Endorsed]: Filed September 13, 1957. Paul P. O'Brien, Clerk.

No. 15710

IN THE

United States Court of Appeals For the Ninth Circuit

JACK SHOWELL AND DOROTHY SHOWELL, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petitions for Review of the Decisions of the Tax Court of the United States

---

BRIEF FOR THE RESPONDENT

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On Petitions for Review of the Decisions of the Tax Court of the United States

---

BRIEF FOR THE RESPONDENT

PREVIOUS OPINIONS

The first findings of fact and opinion of the Tax Court (R. 11-27. No. 14760) are reported at 23 T. C. 495. The former opinion of this Court is reported at 238 F. 2d 148. The memorandum findings of fact and opinion of the Tax Court on remand from this Court (R. 22-27) are not officially reported.

JURISDICTION

The Commissioner determined that there were deficiencies in the individual income taxes of Jack Showell and Dorothy Showell for the year 1949 in the amounts of $3,946.65 and $4,065.69 respectively. Notices of these deficiencies, dated February 26, 1953 (R. 6, 11. No. 14760) were mailed to the taxpayers individually. Individual petitions for redetermination of these deficiencies were fild in the Tax Court by each of the taxpayers, within the permitted 90-day period, on April 30, 1953, under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3, 4-6, 121. No. 14760) On January 26, 1955, the Tax Court entered decisions that there were deficiencies in the income tax of Jack Showell and Dorothy Showell, for the year 1949, in the amounts of $3,286.65 and $3,392.25, respectively. (R. 27-28. No. 14760.) Separate petitions for review by this Court were filed by each of the taxpayers on March 9, 1955. (R. 29-32, 121. No. 14760.) This Court had jurisdiction of these petitions for review under the provisions of Section 7482 of the Internal Revenue Code of 1954.

On October 10, 1956, this Court remanded the cases to the Tax Court "on the ground that the findings were not sufficiently definitive." 238 F. 2d 148, 153. A petition for rehearing filed by the taxpayers was denied on November 21, 1956. The mandate from this Court to the Tax Court was filed in the Tax Court on December 3, 1956. (R. 5.) On January 2, 1957, taxpayers filed in the Tax Court a motion to conform the judgment of that court to the findings and on January 23, 1957, a hearing was held on this motion. (R. 5.) On January 31, 1957, memorandum findings of fact and opinion were filed. (R. 22-27.) On May 27, 1957, the

Tax Court entered decisions that there were no deficiencies due from or overpayments due to the taxpayers of income tax for the year 1949. (R. 27-29.) On July 11, 1957, taxpayers filed petitions for review by this Court. (R. 6, 29-33.) Taxpayers invoke the jurisdiction of this Court under the provisions of Section 7482 and 7483 of the Internal Revenue Code of 1954.[1]

QUESTION PRESENTED

Whether the Tax Court's decisions of May 27, 1957, entered pursuant to its memorandum findings of fact and opinion of January 31, 1957, comply with the conditions of this Court's remand of the Tax Court's previous decisions.

STATEMENT

The Tax Court made findings of fact as follows (R. 23):

The taxpayers, Jack Showell and Dorothy Showell, are husband and wife and filed their separate income tax returns for 1949, prepared on the community basis, with the Collector for the district of Arizona.

In their returns for 1949 the taxpayers reported income from interest, from a partnership, and rental income from a building. No income was reported from,

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[1] There is a substantial question as to whether the taxpayers' petitions for review were timely filed and, as a result, whether this Court has jurisdiction. See Section 7481 of the Internal Revenue Code of 1954. This depends on whether this Court's mandate was a directive for a rehearing. Cf. *McGah* v. *Commissioner,* 210 F. 2d 769 (C.A. 9th); *Cherokee Textile Mills* v. *Commissioner,* 106 F. 2d 685 (C.A. 6th); *Virginia Lincoln Furniture Corp.* v. *Commissioner,* 67 F. 2d 8 (C.A. 4th). *Crews* v. *Commissioner,* 120 F. 2d 749 (C.A. 10th), certiorari denied, 314 U.S. 664.

or loss deducted with respect to, any wagering operations.

During 1949 Jack Showell, received money from booking bets on baseball, football and basketball games. No receipts or tickets were given for money placed on bets. Showell did not keep regular, adequate and permanent books and records of his wagering transactions.

Showell had unreported income from wagering operations in 1949 amounting to $19,563.66.

SUMMARY OF ARGUMENT

1. The Tax Court's decisions, entered pursuant to its memorandum findings of fact and opinion, fully comply with the directions of this Court remanding the earlier Tax Court decisions. There is no longer any inconsistency between the findings of fact of the Tax Court and its conclusion. The Tax Court's findings are no longer in the nature of a "reporter's condensed report of the testimony." The Tax Court has found as fact only those things which it believes to be true. It has made it clear that the case presents purely a factual question and that on the basis of the evidence presented, it is "unconvinced" that Showell had gambling losses in the amount set forth on his summary record. It has characterized the evidence as "unsatisfying", but exercising its prerogatives as the trier of fact—prerogatives which this Court specifically recognized in its prior opinion—it has found that Showell did have gambling losses of $3,000 in addition to those allowed by the Commissioner. Thus, we submit that none of the difficulties existing in the prior Tax Court findings of fact and opinion are present in the instant case and, accordingly, the decisions of the Tax Court should be affirmed.

2. The taxpayers should not be permitted in this appeal to raise the same questions which they raised in the earlier appeal and which this Court decided adversely to them. This Court's decisions on the legal questions presented have become the law of the case and there is no reason, whatever, why taxpayers after presenting such argument in a brief, reply brief, oral argument and petition for rehearing should once again be allowed to present the same contentions. This Court has already correctly decided those questions, and the Tax Court decisions correctly apply the law as laid down by this Court. The fact that this Court remanded the earlier case because of a dissatisfaction with the Tax Court findings should not be sufficient to create a vehicle by which the taxpayers are given another full hearing on the same legal questions.

Since the Tax Court's decisions fully comply with the terms of this Court's remand its decisions should be affirmed.

ARGUMENT

The Tax Court's Decisions Fully Comply With the Conditions of This Court's Remand of Earlier Decisions

This is the second time that the instant case has come before this Court. In its prior review of this case (No. 14760) this Court remanded to the Tax Court "on the ground that the findings [of the Tax Court] were not sufficiently definitive." *Showell* v. *Commissioner,* 238 F. 2d 148, 153. The taxpayers then filed a petition for rehearing which was denied by this Court. Thereafter the case was reconsidered by the Tax Court in view of the mandate of this Court, new findings of fact were made, a new opinion written and decisions were entered. The only issue presented then by these petitions

for review is whether the new Tax Court decisions, are proper in view of this Court's opinion in the prior case and its further opinion denying taxpayers' petition for rehearing. We submit that the Tax Court decisions, now under review, are in all respects in compliance with those opinions of this Court and should, accordingly, be affirmed.

1. In the prior case, this Court characterized the Tax Court's findings which were then before it as "a summary of the evidence" which were "so indecisive * * * that they really lack[ed] the elements of decision" and stated that the findings were "more a reporter's condensed report of the testimony" than findings of fact. 238 F. 2d 148, 152. The Court recognized though that such findings could be explained by the state of the record—the fact that all of the testimony in the case was presented by the taxpayers. The Court found that there was an inconsistency existing between the findings of the Tax Court and its ultimate conclusion; for while the findings apparently accepted all of the taxpayers' evidence concerning the manner in which Showell's record of gambling activities was maintained, the Tax Court's conclusion apparently did not regard such evidence as accurate and therefore did not give effect to those findings. As a result, then, of this inconsistency and of the reportorial nature of the Tax Court's findings this Court remanded to the Tax Court.

In the course of its opinion remanding the case to the Tax Court, this Court noted, however, that it was entirely proper for the Commissioner to make a determination that a deficiency existed, by accepting the left hand (gain) column of Showell's record of bookmaking activities, while ignoring the right hand (loss) column, since the stated amount of gains could be considered as

admissions against interest. The Court further noted that it was also proper for the Tax Court either to adopt this theory or modify it, as it did, by finding that some additional[2] losses were incurred, or that the Tax Court could reject that theory completely. The Court made it clear that its dissatisfaction with the Tax Court's conclusions under review in the prior appeal was based upon the fact that such conclusions could only be justified by disbelief of or dissatisfaction with the testimony of record, but the findings were "not sharp enough" to indicate such a disbelief. 238 F. 2d 148, 153. However, the possibility that "on the remand * * * the Tax Court * * * [might] come up with the same result * * * [or] reach another result either more or less favorable to the taxpayer" was expressly left open. 238 F. 2d 148, 152. It was also pointed out in this Court's opinion that it was not necessary for the Tax Court to give full credence to the testimony of taxpayer, Jack Showell, or his close office associate and that the Tax Court had "the right to remain unconvinced, to retain an abiding doubt, and to rule against the petitioner [Showell]." 238 F. 2d 148, 152.

It is in this posture, then, that the instant petitions for review must be considered in order to determine whether the Tax Court decisions are proper in view of the prior remand.

We submit that the Tax Court has properly exercised its prerogatives as the trier of fact and that its decisions are correct in view of the prior opinions of this Court and should, accordingly, be affirmed. In its memorandum findings of fact and opinion, the Tax

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[2] The figures in the "gains" column were presumably net results of the bookmaking activities and therefore took into account some losses. (See R. 25.)

Court has now made it plain that the issue presented in this case is purely factual.[3] The memorandum findings of fact and opinion of the Tax Court no longer contain the inconsistency which existed in the prior findings of fact and opinion; the Tax Court opinion leaves no room for doubt that it did not accept fully Showell's evidence to the effect that he had losses from gambling in the amount claimed. After studying the record before it, the Tax Court has now stated that it was "unconvinced" that Showell had losses in the amount claimed. In so doing, it was exercising an option expressly granted to it by this Court's opinion in the prior case. The Tax Court has this time carefully refrained from making any findings of fact as to the manner in which Showell's record of bookmaking activities was maintained; for, to have done so, would have given an impression, as it apparently did in the prior case, that the record of bookmaking activities was *accurately* maintained and was in all respects true. Instead, the Tax Court had made findings of fact which contain only those facts which it has found to be true. Thus, the Tax Court found that "the petitioner [Showell] did not keep regular, adequate and

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[3] The Tax Court has consistently treated cases of this type as factual and has reached varying results depending upon its appraisal of the evidence in each case. See e.g. *Rainwater* v. *Commissioner,* 23 T.C. 450; *Nemmo* v. *Commissioner,* 24 T.C. 583; *Nellis* v. *Commissioner,* decided February 28, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,050), affirmed, 232 F. 2d 890 (C.A. 6th); *Max Fogel* v. *Commissioner,* decided June 30, 1955 (1955 P-H T.C. Memorandum Decision, par. 55,186), affirmed, 237 F. 2d 917 (C.A. 6th); *Robert Fogel* v. *Commissioner,* decided June 30, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,185), affirmed, 237 F. 2d 918 (C.A. 6th); *Federika* v. *Commissioner,* decided June 28, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,172), affirmed, 237 F. 2d 916 (C.A. 6th), certiorari denied, 352 U. S. 1025, rehearing denied, 350 U. S. 931.

permanent books and records of his wagering transactions." (R. 23.)

In its opinion, the Tax Court has shown that it has carefully considered this Court's opinion in the prior case and has applied the legal principles contained therein. It has restated the familiar rule that it is the taxpayer's burden to prove error in the Commissioner's determination, that is to prove that he incurred losses from gambling in the amounts contended for. The Tax Court opinion reviews the evidence in the case and points out that the only evidence offered to substantiate the existence of the losses claimed is Exhibit 3, the summary sheet of yellow foolscap which showed net amounts of gains and losses on stated dates throughout the tax year. The Tax Court additionally points out (R. 26) that neither the Commissioner nor the Tax Court had any way of testing the accuracy of the totals appearing on the summary sheet unless "we accept as wholly true the testimony of petitioner [Showell] and his accountant that every actual gain or loss was correctly entered thereon". And further applying the principles laid down by this Court in its prior opinion, the Tax Court states that "On this record we are unconvinced that the petitioner suffered wagering losses to the extent claimed". Commenting on the unsatisfactory state of the evidence, the Tax Court adds, however, that it did "believe" that Showell did suffer some losses in addition to those allowed by the Commissioner in his determination and finds as fact that Showell had unreported income from wagering operations in 1949 in the amount of $19,563.66, thus allowing the taxpayers losses of $3,000 in addition to that determined by the Commissioner. (R. 23, 26.)

This Court's prior opinion in this case indicated

that if there had been a Tax Court finding that the testimony was not satisfactory the Tax Court's prior decision would have been allowed to stand. In the findings and opinion entered after the remand by this Court, the Tax Court has expressly stated that "the evidence is unsatisfying" and that "we are unconvinced" by the record that Exhibit 3 was an accurate statement of the taxpayer's bookmaking activities for the year. (R. 26.) Also, in its prior opinion, this Court expressed concern that the absence of records should not cause an "innocent individual * * * to be ruined simply because he has lost the records, if his testimony or remaining skimpy records import honesty". This Court stated that it "should be made clear" by the Tax Court that no absolute rule of law was being promulgated, but rather that the case was a factual one. 238 F. 2d, p. 153. This difficulty, too, has been eliminated by the new opinion of the Tax Court, which states (R. 26): "This is a fact case and what we have decided is necessarily limited to the facts before us".

Thus, we submit, the Tax Court has properly followed the dictates of this Court in its prior opinions. It has eliminated the inconsistency existing in its first opinion, it has expressly pointed out that the evidence was "unsatisfying" and that it was "unconvinced" by the taxpayer's evidence, and that the decision was to "create no such overriding precedent for the future" (238 F. 2d, p. 153) that any individual who might have lost his records would on that score alone be forced to lose any deductions which might have otherwise been available to him. In all respects, then, the Tax Courts' decisions are in complete accord with the mandate of this Court and accordingly should be affirmed.

2. The taxpayers, however, are attempting to use this Court's remand of the prior decisions as an opportunity to receive a full and complete new hearing on issues which have already been presented to this Court and decided adversely to them. Thus, the taxpayers argue (Br. 16-23) to the effect that it was improper for the Commissioner to make a determination based upon an acceptance of the left-hand (gains) column of Exhibit 3, while rejecting the right-hand (losses) column, despite the fact that in this Court's prior opinion it stated (238 F. 2d, p. 152):

> Just as the Tax Court reasons, we see no objection, in the absence of better evidence, to the Commissioner using the left hand figures as income on the theory of admissions against interest. If the findings were a little different here, we would find no objection to the Tax Court reaching the result it did in allowing the taxpayer only $3,000.00 on the right hand side of Exhibit 3 for deductions on their wagering operations".

The taxpayers' argument that the Commissioner has not used a proper method of accounting fails to take into account that the Commissioner has not *changed* the method of accounting used by the taxpayers. He has not made a determination that the taxpayers, who may have been on a cash basis of accounting, should have been on an accrual basis of accounting, or *vice versa*. The Commissioner has merely put the taxpayers to their proof that they did incur gambling losses in order to entitle the taxpayer to deductions under Sections 23(h) of the Internal Revenue Code of 1939. It is well settled that deductions are a matter of legislative grace and as pointed out by this Court in its prior opinion, "the burden of proof is on the taxpayer to

same legal contentions which they have urged before this Court in a brief, reply brief, oral argument, and petition for rehearing and which have all been rejected by this Court. This Court's decision on these questions has become the law of the case. *Todd* v. *Commissioner,* 165 F. 2d 781 (C. A. 9th). The only question which is open in these petitions for review is whether the Tax Court decisions are proper in view of this Court's opinions remanding the prior Tax Court decisions. As we have shown, each of the difficulties which this Court found existing in the prior Tax Court findings and opinion has been remedied in its new findings and opinion. Accordingly, its decisions should be affirmed.

CONCLUSION

For the reasons stated, the decisions of the Tax Court should be affirmed.

Respectfully submitted,

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January, 1958

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No. 15710

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

JACK SHOWELL AND DOROTHY SHOWELL,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF FOR PETITIONERS

On Petitions for Review of the Decisions of The Tax Court of the United States

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OPINIONS BELOW

There have been two opinions of the Tax Court of the United States in this case. The first, a regular opinion, was promulgated December 16, 1954, and the findings of fact and opinion of the Tax Court are reported at 23 T. C. 495. The second, a memorandum opinion, after remand by this Court, was promulgated January 31, 1957, and the findings of fact and opinion of the Tax Court, although not officially published, may be found at 16 TCM 103, Dec. 22, 239 (M), T. C. Memo. 1957-22.

JURISDICTION

This appeal involves income taxes. By two notices of deficiency, each dated February 26, 1953, addressed separately to Jack Showell and Dorothy Showell, the Commissioner of Internal Revenue determined deficiencies of $3,946.65, and $4,065.69 respectively for the taxable year 1949 (R. No. 14760 at 6, 7, 121). Identical petitions, under the authority of Section 272 (a) of the Internal Revenue Code of 1939, were filed with the Tax Court of the United States on April 30, 1953, seeking a redetermination of the deficiency set forth in each notice of deficiency (R. No. 14760 at 4, 121). The first decisions of the Tax Court were entered on January 26, 1955 (R. No. 14760 at 27, 28). Those decisions found that there was a deficiency in income tax for Jack Showell in the amount of $3,286.65, and a deficiency in income tax for Dorothy Showell in the amount of $3,392.25. The cases were then brought to this Court by separate Petitions for Review which were filed on March 9, 1955 (R. No. 14760 at 29, 121). The jurisdiction of this Court to review the aforesaid decisions of the Tax Court was founded on Sections 7482 and 7483 of the Internal Revenue Code of 1954.

Thereafter, on October 10, 1956, this Court, in a majority opinion written by Judge Chambers, remanded the cases to the Tax Court of the United States for further proceedings on the ground that the findings of fact were not sharp enough or sufficiently definitive. *Showell v. Commissioner,* 9 Cir., 1956, 238 F. 2d 148. Subsequently, on January 31, 1957, the Tax Court filed a memorandum opinion which arrived at the same result, insofar as petitioners' alleged deficiencies were concerned, as it did in its first and regular opinion of December 16, 1954. Since each deficiency, determined by the Tax Court's regular opinion of December 16, 1954, and decisions of January 26, 1955, had been paid by petitioners after January 26, 1955, the Tax Court, on May 27, 1957, entered decisions that there were no deficiencies due from or overpayments due to petitioners for 1949 (R. No. 15710 at 28, 29). The cases were then brought to this Court by separate Pe-

titions for Review which were filed on July 11, 1957 (R. No. 15710 at 29-34). The jurisdiction of this Court to review the decisions of the Tax Court of May 27, 1957, is founded on Sections 7482 and 7483 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED

Instead of asserting deficiencies on the basis of either the bank deposits or net worth and disbursements methods, the Commissioner relied wholly on the correctness and veracity of petitioners' own permanent record, in evidence as Exhibit 3, as the sole basis of his deficiency notices (R. No. 14760 at 45). This fact is revealed by the testimony of the examining agent, U. S. Internal Revenue Agent H. L. Mende, who testified on direct examination as follows:

> "Q. Mr. Mende, is the Exhibit 3, which is now in evidence, the only source of the amount of $11,281.83 set forth in the notices of deficiency?
>
> A. To the best of my knowledge and belief, it is." (R. No. 14760 at 45).

Thus, it was found that all of the entries appearing in the "Gain" column of Exhibit 3 were accepted by the Commissioner while all, except for entries representing certain expense items, in the "Loss" column were rejected (R. No. 14760 at 16-18, 51). Such action was taken by the Commissioner in spite of the fact that the entries made in both the "Gain" and "Loss" columns were net gains or net losses (R. No. 14760 at 15). That is, the total of all losing bets was deducted from the total of all winning bets and the resulting net gain or net loss entered on Exhibit 3 under the "Gain" column if a net gain, or the "Loss" column if a net loss (R. No. 14760 at 14, 15). In explaining the above procedure used to determine petitioners' correct income, the examining agent testified as follows:

> "Q. Were any of the gains or losses used in computing the 'Gain' column substantiated?

A. No more than the losses.

Q. In other words, is it correct to say that you accepted all of the amounts in the 'Gain' column and rejected all the amounts in the 'Loss' column?

A. Except those expenses I told you about." (R. No. 14760 at 51).

From the above material, it is clear that the Commissioner accepted both the method of accounting regularly employed by petitioners (R. No. 14760 at 104) and the truthfulness and accuracy of his permanent record (Exhibit 3) for the purpose of computing and asserting deficiencies in tax. However, it is also equally clear that the Commissioner rejected the same method of accounting, and the accuracy and truthfulness of the same record or piece of paper (Exhibit 3) when any entries resulted in the conclusion that no additional income had been realized.

No testimony or evidence of any kind was introduced by the Commissioner at the trial of this cause except for the original 1949 federal income tax return of each petitioner. In fact, the Commissioner's counsel frankly stated in the opening statement:

> " . . . You may wonder why we are here in such a case, but this is somewhat of a test case to see how far a person engaged in the betting and booking business may operate without keeping the usual records which are kept by a merchant and a man in business . . . " (R. No. 14760 at 39).

The Tax Court, in its first opinion of December 16, 1954, 23 T. C. 495, and in its second opinion of January 31, 1957, sustained the Commissioner's action in substance by holding that the "Loss" column entries were reliable only to the extent of $3,000 more than the four expense item entries. The Tax Court did not state which of the entries were reliable and which were unreliable, or why the "Loss" column entries were reliable only $3,000 worth. The effect of this finding was to disregard a total of $20,144.77 in record entries appearing in the "Loss" column (R. No. 14760 at 17, 18), and to find that petitioners sustained additional income of $19,563.66.

Later when the cases came before this Court, it was decided by the majority, in an opinion written by Judge Chambers, that "the only thing that justifies the conclusions reached by the Commissioner or the Tax Court is disbelief or dissatisfaction with the testimony," but "the findings are not sharp enough to tell us this." Thus, the remand to the Tax Court was on the ground that "the findings were not sufficiently definitive."

The first issue before this Court is whether the Tax Court has complied with the remand. The second issue is whether the Tax Court should be reversed in that its decision permitted the Commissioner to determine deficiencies without complying with Section 41 of the 1939 Internal Revenue Code which requires that he adopt a method of accounting. The third issue is whether the decisions are not supported by the evidence, are clearly erroneous, and are not in accordance with law. Finally, there is the issue of whether the Tax Court erred when the trial judge refused to admit certain evidence concerning petitioners' net worth and disbursements for 1949 in view of its finding of fact that petitioners' records were inadequate.

The present appeal is in the nature of a rehearing. *McGah v. Commissioner,* 9 Cir. 1954, 210 F. 2d 769.

SPECIFICATION OF ERRORS RELIED ON

1. The Tax Court erred in that its findings did not comply with the opinion of the United States Court of Appeals for the Ninth Circuit remanding the case for more definitive findings of facts.

2. The Tax Court erred in finding as fact that petitioner did not keep regular, adequate and permanent books and records of his wagering transactions while at the same time sustaining respondent's determination of income which was not based on any method of reconstructing income as required by Section 41 of the Internal Revenue Code of 1939.

3. The Tax Court erred in refusing to allow petitioner to introduce evidence respecting his net worth and disbursements in

view of its finding of fact that he did not keep regular, adequate and permanent books and records.

4. The Tax Court erred in treating as evidence the general presumption of correctness which attaches to the Commissioner's determination.

5. The Tax Court erred in that its decision is not supported by the evidence, is clearly erroneous, and is not in accordance with law.

ARGUMENT

Rather than bolt directly into the issues raised by the Tax Court's second decision in this case (16 TCM 103, Dec. 22, 239 (M), T.C. Memo. 1957-22) petitioners ask the Court if it will first consider the framework of reference in which this second appeal is being heard.

When this case was tried before Judge Withey of the Tax Court, the Commissioner made an opening statement concerning the nature of the issue before the Tax Court:

> ". . . You may wonder why we are here in such a case, but this is somewhat of a test case to see how far a person engaged in the betting and booking business may operate without keeping the usual records which are kept by a merchant and a man in business, . . ."(R. No. 14760 at 39).

> ". . . *it does present the question as to how much the* taxpayer must keep and record his losses in such cases." (R. No. 14760 at 40). (Emphasis supplied).

In like vein, the U. S. Internal Revenue Agent who worked the case testified in explaining why he rejected the items appearing in the "Loss" column that:

> ". . . *they wanted to test it out whether proper records should be kept in the case.*" (R. No. 14760 at 51). (Emphasis supplied).

Later in his two paragraph brief filed with the Tax Court, re-

spondent contended that the deficiencies should be sustained because:

> ". . . petitioner's records of wagering transactions are not susceptible of investigation. It is impossible to audit the meager records kept by petitioner. The *respondent cannot determine his correct tax liability from the records furnished by the petitioners.*" (R. No. 15710 at 20-21). (Emphasis supplied.

From the foregoing materials it is apparent that the Commissioner of Internal Revenue asked the Tax Court to sustain the proposition that although "respondent cannot determine his (the taxpayer's) correct tax liability from the records furnished by the petitioner", deficiencies in income tax (which of necessity assume some correct tax), based upon one-half of those same records, should be sustained. No statutory or case law authority was cited by respondent except the case of *Johnson v. United States,* 1941, 94 Ct. Cls. 345, 39 Fed. Supp. 103, wherein the taxpayer kept no records at all of income or expenditures.

On the other hand, petitioners contended that, on the record before the Tax Court, they had carried their burden of proof and were entitled to judgment to the effect that petitioners had not sustained additional income in 1949. It was pointed out that the burden of proof had been carried by:

(1) The introduction in evidence of Exhibit 3.

(2) The uncontradicted testimony of petitioner Showell and of Houston L. Walsh as to the manner and accuracy of its preparation.

(3) Respondent's action in relying on Exhibit 3 as the sole basis of his notice of deficiency.

(4) The evidence concerning petitioners' net worth and disbursements for 1949.

Thereafter, the majority of the Tax Court ruled that:

> ". . . we cannot accept the evidence as *conclusively* proving

the full amount of the claimed losses. . ." (R. No. 14760 at 20) (Emphasis supplied).

and found as ultimate fact that petitioners realized additional income of $19,563.66 during 1949. However, the Tax Court's first decision and opinion raised certain questions which petitioners wished to submit to this Court by means of an appeal. Some of these questions were:

(1) Was the majority opinion correct in its interpretation of the burden of proof rule when it required that the latter be carried by *conclusive* proof?

(2) Was the ultimate finding of fact respecting $19,563.66 of additional income not contrary to the findings of fact concerning the precise manner in which Showell, with the help of Houston L. Walsh, transferred the amounts from daily records to Exhibit 3?

(3) Was the Tax Court in error when it denied petitioners the right to introduce certain net worth and disbursements evidence as some proof that petitioners realized no additional income in a case where the Commissioner had in effect refused to accept part of petitioners records?

Subsequently, the first appeal to this Court was heard. During that appeal, petitioners hoped they could persuade the Court that the Tax Court's decision against petitioners was preordained so long as it adopted what petitioners believed were the incorrect premises that (1) the case was one involving the disallowance of specifically claimed losses rather than the adequacy of petitioners' permanent record, as respondent had stated, and (2) that a taxpayer must prove those losses *conclusively*. The reasons such a decision would be inevitable were that premise No. 1 avoided the fact that the Commissioner's deficiency was itself based solely on the accuracy of one-half of petitioner's record (Exhibit 3) while premise No. 2 imposed a burden of proof no taxpayer can carry.

It was in this context that the majority and minority opinions were written by Judges Chambers and Pope respectively. *Showell v. Commissioner,* 9 Cir., 1956, 238 F. 2d 148.

I

The Tax Court's Memorandum Opinion of January 31, 1957, Failed To Comply With This Court's Remand.

When Judge Chambers wrote this Court's majority opinion in *Showell v. Commissioner,* 9 Cir., 1956, 238 F. 2d 148 he set forth the entire 1496 words which had appeared under the designation "Findings of Fact" in the Tax Court's first and officially published opinion herein. *Showell v. Commissioner,* 1954, 23 TC 495. Among those findings of fact will be found the following:

> "At the end of the day, if a baseball or basketball game was involved, or at the end of the week if a football game was involved, the petitioner would read to Houston L. Walsh, who *shared* an office with petitioner, the amounts entered on the slips of paper and the tally sheets to be paid to winning bettors and Walsh added them on an adding machine. A similar procedure was followed for determining the amount of the losing bets. When the *totals* of both were obtained, a similar procedure was followed *with Walsh reading* to petitioner *from the slips of paper and tally sheets* and petitioner operating the adding machine. After the foregoing procedures had been gone through, entries, *as follows*, were made on a sheet of columnar paper, entitled 'Sports'—1949' and submitted in evidence as petitioner's Exhibit 3. If the total of the amounts of the bets by losing bettors exceeded the total of the amounts to be paid to winning bettors, *the amount of the excess was entered* on Exhibit 3 in a column under the heading 'Gain'. If the total of the amounts to be paid winning bettors exceeded the total of the amounts of the bets by losing bettors, *the excess was entered* on Exhibit 3 in a column under the heading 'Loss'." (R. No. 14760 at 14, 15) (Emphasis supplied).

Nevertheless, although the above findings of fact found that the losses incurred were recorded on Exhibit 3, the Tax Court's decision disallowed $19,563.66 of the entries under the Loss column.

Therefore, later in the majority opinion, Judge Chambers said:

> "The only thing that justifies the conclusions reached by the Commissioner or the Tax Court is disbelief or dissatisfaction with the testimony. Yet the findings are not sharp enough to tell us this. . . .
>
> "The remand therefore will be on the ground that *the findings* were not sufficiently definitive." (Emphasis supplied).

Thereafter, the Tax Court in an unofficially published memorandum opinion (16 TCM 103, Dec. 22, 239 (M), T.C. Memo. 1957-22) substituted the following 123 words under the designation "Findings of Fact".

> "The petitioners are husband and wife and filed their separate income tax returns for 1949, prepared on the community basis, with the collector for the district of Arizona."
>
> "In their returns for 1949 the petitioners reported income from interest, from a partnership, and rental income from a building. No income was reported from, *or loss deducted* with respect to, any wagering operations."
>
> "During 1949 Jack Showell, sometimes referred to as the petitioner, received money from booking bets on baseball, football and basketball games. No receipts or tickets were given for money placed on bets. *The petitioner did not keep regular, adequate and permanent books and records of his wagering transactions.*"
>
> "Petitioner had unreported income from wagering operations in 1949 amounting to $19,563.55." (R. No. 15710 at 23). (Emphasis supplied).

Are these fiindings sharp enough to tell this Court that the Tax Court disbelieved or was dissatisfied with *the testimony?* Petitioners ask how they could be in view of the complete absence of any finding of fact concerning whether or not the Tax Court disbelieved or was dissatisfied with the testimony of petitioner and the witness Houston L. Walsh. In view of Judge Chambers' statement that the *only* justification for the conclusion reached by

the Tax Court is disbelief or dissatisfaction with *the testimony* and that the *findings* do not so state, how can the lack of such a finding of fact, after remand, be explained? Petitioners submit that this is no oversight by the Tax Court but is a conscious and determined refusal to make any findings of fact that it did not believe Showell and Houston L. Walsh. The reasons for such refusal are:

(1) The Tax Court judge who wrote the memorandum opinion of Januray 31, 1957, who also spoke for the majority in the regular opinion of December 16, 1954, did not observe the demeanor of the witnesses.

(2) It was the testimony of petitioner Showell and Houston L. Walsh which was the basis of nearly every finding of fact set forth in the Tax Court's first regular opinion of December 16, 1954, found at 23 TC 495.

(3) Exhibit 3, a permanent record maintained by petitioner Showell with the assistance of Mr. Walsh, was the sole basis of the Commissioner's statutory notice of deficiency.

(4) Such a finding of fact would be contrary to a request for a finding of fact filed with the Tax Court by the Commissioner (Requested Finding of Fact No. 3, R. No. 15710 at 19).

(5) The Trial judge's dissenting opinion of December 16, 1954, showed that credibility of the witnesses was not relevant insofar as he was concerned since it was his conclusion that it was impossible for petitioners to carry the burden of proof without the individual bet slips.

No doubt the above reasons explain why the Tax Court attempted to skirt around its dilemma by the statement found under the designation "Opinion" rather than "Findings of Fact" that:

> "On this *record* we are unconvinced that petitioner suffered wagering losses to the extent claimed." (R. No. 15710 at 26). (Emphasis supplied).

However, even if such a statement in the opinion could qualify

as a finding of fact, does it constitute a *sharp* statement that the Tax Court disbelieved or was dissatisfied with *the testimony?* There are important differences between a statement that the court is *unconvinced* with *the record* and the statement that the court disbelieves or is dissatisfied with *the testimony,* particularly in view of the background of this case. The statement that the Tax Court is unconvinced on the record may simply be another way of saying that petitioners did not offer conclusive proof and therefore the Tax Court is unconvinced on the record. For the Tax Court to offer in its opinion the very ambiguous statement that it was unconvinced on the *record,* in the face of Judge Chambers' clear statements that conclusive proof is not necessary and that the *only* justification for the conclusions reached is disbelief or dissatisfaction with *the testimony* which the *findings* are not sharp enough to tell, is tantamount to a statement by the Tax Court that it will not find that it disbelieved or was dissatisfied with the testimony.

Furthermore, how could the Tax Court, as a practical matter, find that it disbelieved the testimony of the witnesses and at the same time allow $3,000.00 more of the entries appearing in the 'Loss' column of Exhibit 3? How does the Tax Court believe the witnesses only $3,000.00 worth? What testimony with relation to what entries in the Loss column of Exhibit 3 was believable and satisfactory and what testimony with relation to what entries in the Loss column of Exhibit 3 was unbelievable and unsatisfactory? If the testimony was unsatisfactory and not believable, it was so with respect to all of Exhibit 3.

When the Court examines findings of fact requested by respondent and petitioners (R. No. 15710 at 7-10, 19), it will be seen why the Tax Court could not find that it disbelieved or was dissatisfied with the testimony concerning Exhibit 3. Should such a finding be made, it would constitute a refusal to find facts about which the parties had no dispute. For instance, the Commissioner requested the Tax Court to find as fact that:

"Petitioner's method of accounting for the results of wagering transactions was to record on slips of paper the essential facts of each wager, to add up the day's wins and losses and *record* the excess only of gains or losses opposite the date. (Tr. 28-33). The original slips of paper and other sheets were destroyed (Tr. 32, 59), and the only permanent record retained was *the entry* of such final results of each day's betting (Ex. 3)." (R. No. 15710 at 19). (Emphasis supplied).

Surely if the party asserting the tax deficiencies against petitioners did not dispute the fact that daily net wins and losses were recorded on Exhibit 3, it is not difficult to see why the Tax Court is reluctant to find as fact that it disbelieved or was dissatisfied with the testimony concerning those entries. All it could say, in its opinion, was that it was unconvinced with the *record.* But what part of the record? Wherein did petitioners fail? Would the Tax Court have ruled otherwise if the individual bet slips had been placed in evidence? How can a United States Court of Appeals determine whether this dissatisfaction with the record (an all inclusive term) was due to an adoption of the rule of law that conclusive proof is required or was based on disbelief of testimony concerning Exhibit 3 which even the respondent has not disputed? Also such a finding would violate the Tax Court's own rules of practice.

Rule 35 (d) (3) of the Rules of Practice of the Tax Court of the United States provides:

"The party having the burden of proof shall set forth complete statements of the facts based upon the evidence. Each statement shall be numbered, shall be complete in itself, and shall consist of a concise statement of the essential fact and not a discussion or argument relating to the evidence or the law. Reference to the pages of the transcript or the exhibits relied upon in support thereof shall be inserted after each separate statement.

"If the other party disagrees with *any* or all of the statements of fact, he *shall set forth each correction* which he believes the evidence requires and shall give the same numbers to his state-

ments of fact as appear in his opponent's brief. His statement of fact shall be set forth in accordance with the requirements above designated." (Emphasis supplied).

In this case the Commissioner not only failed to disagree with petitioners' requested findings of fact concerning Exhibit 3, but he actually asked for the same finding. (R. No. 15710 at 7-10, 19). Consequently, how could the Tax Court find that it disbelieved or was dissatisfied with the testimony concerning the method and accuracy by which Exhibit 3 was maintained? All it could do was talk in its opinion in terms of generalities saying it was unconvinced with the *record* rather than find as fact it disbelieved or was dissatisfied with the testimony.

Next, are the above 123 words more "definitive" than findings of fact which consumed 1496 words? Petitioners' counsel are fully aware of the important distinction between quantity and quality, but is it reasonable to conclude that these particular 123 words are more definitive and sharper than the 1496 found in the Tax Court's first regular opinion? The only method of securing an answer is to examine each finding separately and then in conjunction with all of the findings.

To begin with, what do the first five sentences supply in the way of definitiveness and sharpness which was lacking in the Tax Court's findings of fact in its first decision? These five sentences constitute a verbatim reproduction of the first five sentences of the Tax Court's first findings of fact in its first decision (R. No. 14760 at 12). The sixth sentence states that petitioner did not keep regular, adequate and permanent books and records of his wagering transactions while the seventh and final sentence is merely a paraphrase of the ultimate finding of fact in the first decision which provided that petitioner sustained additional wagering losses of $3,000.00 over those allowed by respodent.

In other words, until the final sentence of the findings is uttered, there is not a single specific or particular finding of fact in support thereof. It is a bolt out of the blue, which, if permitted to

stand, makes an opinion an unnecessary appendage. It is the kind of "finding of fact" which is a mixed conclusion of ultimate fact and law arbitrarily thrown at the taxpayers to make of as they will. The Tax Court has done this sort of thing before and has been continually reversed. The Tax Court must find the facts upon which its findings of unreported income is based. *Timmons v. Commissioner,* 4 Cir., 1952, 198 F. 2d 141. The Tax Court may not, as it has here, find only that petitioner's losses were less than those claimed. *Mesi v. Commissioner,* 7 Cir., 1957, 242 F. 2d 558. Such "findings of fact" neither comply with the substance nor the spirit of the statutory requirement that the Tax Court *shall* report in writing *all* its *findings of fact.* 26 U.S.C.A. § 7459 (b). Certainly it affords a United States Court of Appeals no opportunity to measure and evaluate the decision against the basic findings of fact upon which it rests. In fact, the above 123 words of findings of fact "supporting" the Tax Court's second decision are one step and only a very few words away from a ruling which simply says: "The taxpayer loses. Sorry." Also, what happened to the findings of fact, consuming 1496 words, set forth in the first decision, which detailed the precise manner in which Exhibit 3 was maintained? Can those facts, designated by the Tax Court as findings of fact in its first opinion, evaporate or merely disappear into some limbo for unwanted findings of fact? They can still be found and read at 23 TC 495. The Tax Court has not yet stated that it repudiated those earlier findings of fact concerning Exhibit 3. All it says, and that is said in the opinion rather than in the findings of fact, is that it is unconvinced on the *record.*

If it is held that the findings of fact set forth by the Tax Court in response to this Court's opinion are sufficiently definitive, then it is submitted that there was little reason to remand the case because the same ultimate finding that Jack Showell realized $19,563.66 of additional income, along with the other findings now found in the memorandum opinion, were all found in the Tax Court's first opinion. It is true that in the first decision the Tax Court's ultimate findings stated that wagering losses of $3,-

000.00 more than those allowed by the Commissioner were sustained. However, since the statutory notices of deficiency addressed to each petitioner asserted additional income of $22,-563.66, an ultimate finding of fact that petitioners sustained $19,-563.66 of additional income is simply another way of saying that petitioners were entitled to losses of $3,000.00 more than those allowed by the Commissioner who had claimed $22,563.66 of additional income. It is a matter of arithmetic: $22,563.66 minus $3,000.00 is $19,563.66.

Petitioners submit that the 123 word findings of fact set forth by the Tax Court in support of its second decision are not sharper or more definitive when measured by the standards of either quantity or quality. If they are, then George Orwell's notion that *less is more* is not so unreal after all. In any event, it is doubtful that a contention could be sustained that this Court's majority opinion called for no findings of fact except the ultimate findings of fact in view of the complaint it had previously registered concerning the Tax Court's failure to voluntarily comply with Rule 52 of the Federal Rules of Civil Procedure. *Gillette's Estate v. Commissioner,* 9 Cir., 1950, 182 F. 2d 1010.

Whether the Tax Court's first decision can be reaffirmed merely by rearranging its opinion and placing its original findings of fact under the designation "Opinion" in the second memorandum opinion or eliminating findings of fact inconsistent with the decision is a matter which petitoners leave to this Court.

II

The Tax Court Erred In Sustaining A Determination Of Income Not Determined In Accordance With Any Method Of Accounting.

There are other reasons why the Tax Court's decision should be reversed. These arise as a result of the new finding of fact, found in the sixth sentence, that "the petitioner did not keep regular, adequate and permanent books and records of his wagering transactions." (R. No. 15710 at 23). Accepting for purposes of

argument that this finding is not clearly erroneous or mistaken, what is its legal effect? To answer the question, it is necessary to turn to Section 41 of the Internal Revenue Code of 1939 which provides that:

> "Sec. 41. The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with *such method* as in the opinion of the Commissioner *does clearly reect the income. . . .* " (Emphasis supplied).

The above language "if the method employed does not clearly reflect the income" has been interpreted by the courts, including the Tax Court, to comprehend the situation where a taxpayer's records are inadequate. Thus, 2 CCH 1953 Fed. Tax Rep. ¶ 386.011 states:

> "011. Reconstruction of income. — Where a taxpayer keeps no books or records *or his records are inadequate,* the Commissioner may under authority of Code Sec. 41 compute his income in accordance with *such method* as in the opinion of the Commissioner will clearly reflect the taxpayer's income." (Emphasis supplied).

The courts have further held that the method adopted by the Commissioner must be reasonable. *Bradstreet Co. of Maine v. Commissioner,* 1 Cir., 1933, 65 F. 2d 943; *Schira v. Commissioner,* 6 Cir., 1957, 240 F. 2d 672; 2 Mertens, Law of Federal Income Taxation, Cum. Supp. p. 30, 31. The method adopted must properly reflect the taxpayer's income. *A & A Tool & Supply Co. v. Commissioner,* 10 Cir., 1950, 182 F. 2d 300, 302. In the *Bradstreet* case, *supra,* the Court said: "the burden to adopt *a method* that will clearly reflect the income is on the Commissioner equally as well as on the taxpayer." And in *H. T. Rainwater,* 1954, 23 TC 450, the Tax Court itself said:

> "Of course, the destruction of records is a factor that may be taken into account in various circumstances such as the determination of fraud, and it may justify the Commissioner in using *some reasonable method* of reconstructing a taxpayer's income, with the burden upon the taxpayer to show that the Commissioner is in error. . . ."

Some of the methods approved by the courts when the books and records are inadequate or non-existent are (1) bank deposits, (2) percentage basis, and (3) net worth and disbursements. 2 Mertens, Law of Federal Income Taxation, §12.12.

Here there was no method used at all. The Commissioner simply extracted the total of the figures appearing under the Gain column of Exhibit 3 less 4 entries and adopted the sum as net income from wagering, while ignoring the companion figures appearing under the column entitled Loss. Is this a *method* of determining income? Is it a method that *clearly* reflects income? Petitioners submit that it is no method at all much less one which clearly reflects income. The word "method' according to the 1951 edition of the Thorndike-Barnhart Dictionary means "system in doing things; order in thinking." Two of the synonyms given are "plan" and "design." Yet where is the system or order when the Commissioner determines income by picking and choosing the entries in a taxpayer's records which reflect income while at the same time ignoring each entry which reflects a lesser income. Surely it cannot be said that there were no methods available to the Commissioner to ascertain Jack Showell's net income if he was dissatisfied with the adequacy of his books and records. The net worth and disbursements method has been used in such cases along with the bank deposits and percentage basis. As the Tax Court itself stated in the similar and later case of *Ross v. Commissioner,* 15 TCM 23; Dec. 21, 511 (M); T. C. Memo. 1956-5:

> "Respondent's statutory notice determines no fraud, mathematical inaccuracy, or *specific* discrepancy with respect to the 'outs'. This position is, in substance, that there is no practical way in which he can verify by audit the amount of the 'outs'

> because petitioners did not require receipts for 'outs' or obtain the names and addresses of winning bettors. We doubt whether such data would have been of material assistance in an audit because it is unlikely that true names and addresses would have been furnished to bookmakers. We recognize the difficulty of an effective audit, however, we do not think the solution lies in the effort to apply an unrealistic formula. Other techniques, such as the determination of income by the net worth increase method, have been developed which have been quite effective in ferreting out unreported income where the usual auditing methods are inadequate. No such method has been availed of in the instant case."

Likewise, in the instant case, the net worth and disbursements method, as well as any other method which would clearly reflect income, was available to the Commissioner when he had concluded that the taxpaper's records were inadequate. Yet no method was adopted here.

Furthermore, the Tax Court refused to sustain the Commissioner in two other cases nearly identical to the case at bar stating that such a reasonable *method* of determining income was lacking. *Ross v. Commissioner, supra,* and *Snyder v. Commissioner,* 14 TCM 1126, Dec. 21, 310 (M), T.C. Memo. 1955-293. In each of these cases and in the *Rainwater* case, *supra,* the taxpayer was a bookmaker whose books and records were held inadequate. In each case the Commissioner disregarded the net loss shown on the taxpayer's permanent record and limited them to a percentage of the gross intake currently being paid out by race tracks. In each case the Tax Court held that the reconstruction of the income was arbitrary on the ground that a bookmaker's loss percentage was not likely to correspond with that of a race track. Yet in the case at bar there was no formula of any kind used, no utilization of any method of determining income, and yet the Tax Court sustained the Commissioner. Thus, the Commissioner has found an ideal solution to the problem which is not to adopt any method at all. Do not use percentages, do not use net worth and disbursements or bank deposits, but simply disregard certain en-

tries in a permanent record. In this case the Tax Court is saying that although the books and records are inadequate in its opinion, the Commissioner may extract those figures appearing under the Gain column and reject everything else. If allowing losses equal to a percentage based on race track losses is arbitrary, how can a pure and unadulterated guess both by the Commissioner and the Tax Court be reasonable? When the Commissioner uses a method of determining income such as the net worth and disbursements method he cannot make an arbitrary guess as to any of the net worth components. *Thomas v. Commissioner,* 1 Cir., 1956, 232 F. 2d 520. If not, then how can the Commissioner or the Tax Court be permitted to guess when no method of any kind was used?

Nor is the lack of the requisite "method" alleviated by the argument advanced by the Tax Court in its first opinion that the "Gain" figures were admissions against interest. The requisite "method" of accounting called for by Section 41 cannot be created or brought into existence simply by invoking a legal rule of evidence, even assuming it is correct in its application. This is because the statute itself requires a "method" if the Commissioner decides the books are inadequate. Thus, once the Tax Court finds as fact, as it has in this second opinion, that petitioner's books and records were inadequate, the admissions against interest argument as applied to the "Gain" column becomes irrelevant. In short, the legal concept of admissions against interest, even if the Tax Court had correctly applied it, is not a method of determining income as required by Section 41.

If the Commissioner had adopted the net worth and disbursements method or any other method for that matter, petitioners could submit evidence in reply. However, in this case the Commissioner and the Tax Court used no method at all. Instead the Commissioner relied entirely on the legal presumption of prima facie correctness of his determination which evaporated at the trial when contrary evidence was placed in the record. *J. M. Perry Co.*

v. Commissioner, 9 Cir., 1941, 120 F. 2d 123; 9 Mertens, Law of Federal Income Taxation, § 50.71 (1943).

Under Section 41 of the 1939 Internal Revenue Code, the Commissioner may bypass or ignore a taxpayer's books and records which he deems lacking or inadequate, but he must then adopt a *method* of reconstructing income which is reasonable and clearly reflects income. Here the Commissioner cannot have it both ways. He cannot conclude that a taxpayer's records are inadequate, and still maintain that he is not required to adopt any method of ascertaining income. To rule otherwise means that there is no way of overcoming a deficiency determined after the Commissioner rejects a taxpaper's books and records so long as the Commissioner fails to adopt any method of reconstructing income.

Furthermore, even if it were accepted that the means by which the Commissioner ascertained net income in this case could qualify as a method, is it a method which clearly reflects the taxpayer's income as required by Section 41? The comments of the Tax Court and Judge Chambers both reflect that neither this Court nor the Tax Court thought any method was used. Judge Chambers indicated that the determination may be "half arbitrary" or "half intelligent," (*Showell v. Commissioner,* 9 Cir., 1956, 238 F. 2d 148, 152), while the Tax Court called it "speculative" (*Showell v. Commissioner,* 16 TCM 103, 105, Dec. 22, 239 (M), T. C. Memo. 1957-22). Why is this necessary when Section 41 provides methods of ascertaining income, approved by the courts, if the Commissioner refuses to accept a taxpayer's books and records. None of these methods, including the net worth and disbursements method, was even attempted by the Commissioner in this case. Petitioners submit that the fair inference to be drawn is that none of these methods resulted in deficiencies. If the Commissioner rejects the adequacy of a taxpayer's records, as was done here, does it make sense that he may base a deficiency solely upon those same records, or must he, as Section 41 requires, adopt a method of determining income? Of course the Commissioner can adopt any procedure he desires so long as he relies upon the legal pre-

sumption of correctness which attaches to his deficiency. But the question is what is left after the presumption evaporates, as it did here?

Petitioners submit that the law of Federal income taxation, as developed by the courts through the interpretation given Section 41 of the 1939 Internal Revenue Code, makes it unnecessary for the Tax Court or a United States Court of Appeals to approve a determination by the Commissioner which is "half arbitrary, half intelligent" or "speculative." Nor is it any answer to cite *Cohan v. Commissioner,* 2 Cir., 1930, 39 F. 2d 540 as did the Tax Court in its second memorandum opinion. *Showell v. Commissioner,* 16 TCM 103, Dec. 22, 239 (M), T.C. Memo. 1957-22.

Cohan v. Commissioner, supra, is not authority for the proposition that the Tax Court may sustain a determination which by its own words is "speculative." In that case George M. Cohan *kept no record* at all of the amounts he spent for entertainment. The Tax Court therefore refused to allow Mr. Cohan any part of the sums spent, as a deduction, on the ground that it was impossible to tell how much he had in fact spent. The United States Court of Appeals for the Second Circuit held that the Board was *inconsistent* when it said on the one hand that something was spent, but on the other hand allowed nothing, and therefore it ordered the Board to reach some allowance. But is this the situation in the case at bar? In the *Cohan* case, *supra,* the taxpayer maintained no records. In the case before the Court, petitioner Showell maintained a daily permanent record, half of which served as the sole basis of the Commissioner's deficiency determination. In the *Cohan* case, *supra,* the Court of Appeals held the Board was being inconsistent when it said something was spent, but allowed nothing. Is the Tax Court not inconstistent here when it finds as fact that petitioner's books and records of wagering transactions were irregular and inadequate while at the same time sustaining a deficiency based on the entries found in those same inadequate and irregular books and records?

For the foregoing reasons, petitioners contend that the Tax Court was in error when, on the one hand, it found as fact that petitioner's records were inadequate, while, on the other hand, it sustained a determination of income based on no method of any kind. Where the Commissioner's determination is held to be arbitrary, the matter may be remanded to the Tax Court. *Marx v. Commissioner,* 1 Cir., 1950, 179 F. 2d 938. *Helvering v. Taylor,* 1935, 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 623.

III

The Tax Court Erred When It Found That Petitioners Did Not Keep Regular, Adequate, and Permanent Books and Records Of Wagering Transactions.

In *Bechelli v. Hofferbert,* D. C. Md., 1953, 111 Fed. Supp. 631, the facts reflect that the Commissioner of Internal Revenue had determined that certain books and records maintained by restaurant operators were inadequate. The method of keeping books was as follows: At the end of each day one of the partners (or at times a chief employee in the business) prepared a written itemized statement showing the cash receipts for the day as taken from the cash register tape and an itemized statement of the expenses paid for the day for supplies for the kitchen and bar. These daily records were then given every two or three days to the partnership's bookkeeper, one Mr. Owens, who was a long time personal friend of each partner and who did the bookkeeping without pay. Mr. Owens recorded the receipts and expenses for each day. The daily sheets were not preserved. The Court held that:

> "The critical test as to the sufficiency of the books on their face is whether they are sufficient to calculate the net income. If they are sufficient in this respect then the simpler the better. *There is no prescribed detail as to just what books or how many must be kept.* The question in each case must be determined on its particular facts and in view of the nature, volume and complexity of the business. Here the books as kept do show day by day receipts and expenses. If the figures are correct the books are sufficient to show the net income." *Bechelli v. Hofferbert, supra* at 633. (Emphasis supplied.)

Applying the same rule to the case at bar, it follows that if the figures are correct, the books are sufficient to show the net income from wagering. Consequently, since there is no evidence of any kind that Exhibit 3 was not maintained accurately or correctly and no finding of fact that the losses did not occur or that Exhibit 3 contained inaccuracies, the record kept by petitioner (Exhibit 3) is adequate.

As was pointed out by the Court in *Ragsdale v. Paschal,* D. C. Ark., 1954, 118 Fed. Supp. 280, 284:

> "Section 41 of the Internal Revenue Code, 53 Stat. 24, Title 26 USCA 41, provides in part as follows:
>
> 'The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the commissioner does clearly reflect the income. * * * '
>
> "Therefore if the method of accounting used by the plaintiff was a commonly accepted method and the books were sufficiently accurate and complete for the computation of income for the year 1944, then there would be no justification for the Commissioner attempting to reconstruct plaintiff's net income for that year through any alleged increase in net worth, *or by any other method than from the books and records.* This would be so unless there should be found income from some source which the plaintiff had received and which had not been taken into the books. The source of this income and the amount must be ascertainable with at least reasonable definiteness.
>
> "The *defendants have failed to point out any substantial errors in the books and records kept by the plaintiff,* have failed to point out with any degree of certainty any source from which he received income in 1944 not recorded on his books, *and have failed to meet the burden of proving with reasonable clarity the amount of that income.* The agents have stated several possi-

bilities or assumptions, but *neither possibilities or assumptions can take the place of evidence,* and those relied on here do not meet the requirements of the law." (Emphasis supplied.)

The language set forth above is equally applicable here. The Commissioner has not pointed out any errors in petitioner's books and records, much less substantial errors, and has certainly failed to meet the burden of proving with reasonable clarity the amount of that income. Here too there was nothing offered by respondent except possibilities and assumptions.

Finally petitioners ask how a United States Court of Appeals can review or sustain a finding of fact that books and records are inadequate when the Tax Court made no findings of fact as to what records were maintained. How does one review a finding that something is inadequate (a qualitative conclusion) when he is not told in the findings of fact what was kept in the way of books and records?

IV

The Tax Court Decision That Petitioners Sustained Additional Income Of $19,563.66 Is Clearly Erroneous Since It Is Not Supported By The Evidence.

The finding of fact and decision by the Tax Court that petitioners sustained additional income of $19,563.66 is not supported by the evidence and therefore is clearly erroneous (*Wright-Bernet, Inc. v. Commissioner,* 6 Cir., 1949, 172 F. 2d 343) and should be set aside (*Hatch's Estate v. Commissioner,* 9 Cir., 1952, 198 F. 2d 416). A reading of the record below shows that there is no evidence to support the subject finding, and that the Tax Court has erroneously treated an evaporated legal presumption of prima facie correctness attaching to the Commissioner's determination as evidence. In fact, there appears to be no dispute between this Court's majority and minority opinions on this point. Thus, Judge Chambers stated at page 152:

" . . . In a way this may be partly explained by the fact that all testimony was presented by the Showells and on the face of

it *there are no* substantial contradictions anywhere." (Emphasis supplied.)

And Judge Pope said in his opinion at page 154 with respect to Exhibit 3:

> " . . . The findings detail the precise manner in which petitioner, with the aid of the witness Walsh, transferred the amounts from the daily sheets to Exhibit 3. *There is not an iota of evidence that this was not done correctly or accurately* and there is no finding either that the losses did not occur or that the method of computing and transferring them to Exhibit 3 contained any inaccuracies." (Emphasis supplied.)

Therefore, in view of this Court's holding in *Grace Bros. v. Commissioner,* 9 Cir., 1949, 173 F. 2d 170, that uncontradicted testimony *must* be followed, it is clear that the Tax Court's finding is clearly erroneous. This is a case in which both Judge Chambers and Judge Pope concluded there were no contradictions in the testimony or evidence offered by petitioners. Thus, unless the exception set forth in the *Grace Bros.* case, *supra,* at page 174, applies, the testimony must be followed. In that opinion this Court held:

> "It is axiomatic that uncontradicted testimony must be followed. Chesapeake and Ohio Railway Company v. Martin, 1931, 283 U.S. 209, 216, 217, 51S. Ct. 453, 75 L. Ed. 983; San Francisco Association for the Blind v. Industrial Aid for the Blind, 8 Cir., 1946, 152 F. 2d 532, 536; Foran v. Commissioner, 5 Cir., 1948, 165 F. 2d 705. The *only* exception to the rule occurs when we are dealing with testimony by witnesses who stand impeached and whose testimony is contradicted by the testimony of others or by physical or other facts actually proved or with testimony which is inherently improbable." (Emphasis supplied).

Since none of the testimony of the witnesses was impeached or inherently improbable, it follows that the testimony *must* be followed. Therefore, for these reasons the finding of fact that petitioners realized $19,563.66 of additional income is clearly erroneous. The rule announced in the *Grace Bros.* case, *supra,* cannot

be avoided by a sentence in the Tax Court's opinion that it was "unconvinced" where the record contains nothing but uncontradicted testimony which is not inherently improbable.

The Commissioner's determination is presumptively correct. However, when this legal presumption is overcome, as it was here, it evaporates or disappears completely and may not be treated as any evidence whatsoever. *Hemphill Schools Inc. v. Commissioner,* 9 Cir., 1943, 137 F. 2d 961, 964.

V

The Tax Court Misapplied The Burden Of Proof Rule In Requiring Petitioners To Submit Conclusive Proof.

In addition to the previous contentions, petitioners also renew each argument set forth in Point I of their opening brief filed in the first appeal to this Court concerning the burden of proof rule.

There it was argued that the Tax Court erred in requiring petitioners to conclusively prove their case. In this Court's opinion denying petitioners' petition for a rehearing en banc, Judge Chambers ruled that "Such is not the law and we have not said it is." However, if the Tax Court's opinions in this case and in subsequent cases clearly show that the Tax Court thinks such is the law, does that not make suspect the ultimate findings of fact in the Tax Court's second opinion here wherein it found, without any specific findings of fact as a foundation, that petitioners had unreported income of $19,563.66? Also, is it not true that the Tax Court erred as to these petitioners when it applied such a rule in determining what the ultimate facts were?

The best evidence that the Tax Court did apply the conclusive proof rule here is found by turning to its own analysis of *Showell v. Commissioner,* 23 TC 495, found in *Simon v. Commissioner,* 14 TCM 1262; Dec. 21, 375 (M); T.C. Memo. 1955-324. There Judge Van Fosson said:

> "The factual situation with which we are here confronted is quite similar to that in the recent case of Jack Showell, 23 T.C.

495, in that here, as there, it appears that the daily records kept of the bets as they came in each day were destroyed each night after checking with the betters and obtaining a balance, and a notation made of the daily winnings or losses. These, it would seem are the notations appearing in the notebook and which were read off to the accountant by petitioner in preparation of the aforementioned exhibits. Further, these notations were apparently the net result of each day's operation, as was the case in Showell.[1] The character of the supporting evidence as to this item is not such as to command full credence. We cannot accept it as accurate and *conclusive.*" (Emphasis supplied).

It is therefore submitted that the Tax Court has erroneously interpreted the burden of proof rule by requiring more than "a preponderance of the evidence" (*Schilling Grain Corp.,* 1927, 8 BTA 1048) such as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money (*Burnet v. Niagara Falls Brewing Co.,* 1931, 282 U.S. 648, 51 S. Ct. 262, 75 L. Ed. 594).

VI

The Tax Court Erred In Refusing Evidence Concerning Petitioners' Net Worth And Disbursements In View Of Its Finding That Petitioners' Records Were Inadequate.

Petitioners particularly renew each of the arguments contained in Point II of their opening brief filed in *Showell v. Commissioner,* 9 Cir., 1956, 238 F. 2d 148, insofar as they apply to the Tax Court's refusal to accept evidence concerning petitioners' personal disbursements during 1949. Convincing support for the assignment of this ruling as error is reaffirmed by the new finding of fact in the Tax Court's second opinion wherein it stated that "The petitioner did not keep regular, adequate and permanent books and records of his wagering transactions." If the Tax Court was

---

[1] There were important factual differences in the two cases. Here the individual tickets were not destroyed each night, but were kept for several months (R. No. 14760 at 98-99). Also, the totals here were not entered into a notebook by Showell, but were added on an adding machine tape by the witness Walsh and also by Showell (R. No. 14760 at 110-113).

of this opinion, then it committed error in refusing to permit petitioners to complete their submission of evidence via testimony concerning their personal expenditures for 1949. Surely the Tax Court cannot rule that a taxpayer's books and records are inadequate and at the same time refuse evidence, based on the net worth and disbursement method of computing income, as some proof that the books and records were correct or that the taxpayer could not have had the income.

Insofar as the question of a proper foundation is concerned, petitioners ask the Court to consider the following. Judge Chambers, in this Court's opinion of October 10, 1956, *supra* at 153, ruled that a sufficient foundation was not laid for a review of this assignment of error, and stated that ". . . if the only refusal to receive testimony on the net worth method is a refusal to hear about the cost of food, it is doubtful if a case should be reversed." Petitioners submit that the yearly expenditures for food is an indispensible element in proving a taxpayer's income by means of the net worth and disbursements method. The reason, of course, is that proof of an increase or decrease in net worth by itself is meaningless. This is so because personal disbursements (of which food is an important item) are deemed to have been made from cash which passed through the taxpayer's bank account. Consequently, if a taxpayer's cash in the bank at January 1, 1949, amounted to $11,000.00 while the cash in the bank at the close of December 31, 1949, amounted to $1,000.00, there is ostensibly a decrease in net worth of $10,000.00 as to this item. However, if the taxpayer's personal living expenses for 1949 amounted to $5,000.00, this $5,000.00 must be added to the increase or decrease in net worth to arrive at the correct net taxable income for 1949. In short, the net worth method is a misnomer. The proper designation is the net worth *and* disbursements method. Consequently, the petitioners would have failed in their proof had they not offered evidence concerning the cost of food and every other item of personal expenditures made by petitioners during 1949 to prove that the *decrease* in net worth reflected by Exhibit

9 and Jack Showell's testimony was not due to high personal disbursements. For example, a taxpayer's opening and ending net worth could be $100,000 for a given year, and yet he might be found to have realized $50,000.00 of income under the net worth and disbursements method if he spent $10,000.00 for food, $5,000.00 for liquor, $25,000.00 for gifts to friends, $5,000.00 for rent, and $5,000.00 for miscellaneous items such as insurance premiums, shaving soap, gasoline, clothes, etc.

Furthermore, the Tax Court was not unaware of why petitioners were offering the evidence. An exhaustive foundation in the form of questions and answers concerning net worth and disbursements was laid from page 46 through page 59 of the transcript (R. No. 14760 at 75-86). Petitioners' counsel stated to the trial judge just before the objection was sustained

> "Mr. McLane: I am attempting to show total expenses of petitioner during 1949 were such that any difference in net worth could not have been lost in large expenditures during that year." (R. No. 14760 at 85).

Thereafter, respondent's counsel objected on the following grounds and was sustained:

> "Mr. Crouter: I do object, first, it is not the best evidence. The figures could be added up. I offered to stipulate on any documents [2] in this case days before trial and if those will total, it seems to me the figures could have been counted up sometime ago. However, my objection is deeper than that. I do not see how the question of how much is spent on food and automobiles would have any bearing on loss. It is *immaterial* and *irrelevant* and it is not contributing toward the end we are asking about at all."
>
> "The Court: I will sustain his objection." (R. No. 14760 at 85-86) (Emphasis supplied).

Prior to the above exchange, the following conversation occurred with respect to Exhibit 9 itself:

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[2] Documents have nothing to do with testimony concerning a taxpayer's cash expenditures for food, rent, gasoline, entertainment, etc.

"Mr. Crouter: Your Honor, I do *not* have any objection, but it seems irrelative and immaterial unless Counsel connects it up with loss.

"Mr. McLane: It would seem to me appropriate, when respondent can prove a deficiency by the net worth method, and taxpayer can prove it would be impossible by the use of the same method.

"Mr. Crouter: That brings up what I was afraid of. It seems to me that there have been *specific*[3] disallowances of *total* alleged losses or *specific loss* and it is not the net worth approach at all in the usual sense. I am just wondering whether this would add anything to substantiate the loss. It is very remote at best.

"The Court: I will overrule the objection, but by so doing, I am not ruling one way or the other there is a net worth case. I will receive the evidence for what it is worth." (R. No. 14760 at 77) (Emphasis supplied).

From the above language, it is submitted that the trial judge was well aware of the reasons the evidence concerning net worth was being offered, and in fact overruled an earlier objection. Later, however, he sustained an objection as to relevancy and materiality concerning an indsispensible part of net worth evidence. Nor can it be said, in view of the above statements by petitioners' counsel, that the trial judge was not fully appraised of the reasons for which the evidence was being tendered.

Petitioners submit that when the Tax Court sustained the objection to the whole line of testimony based on materiality and relevancy, after the above exchange and previous explanations to the trial judge and after several pages of questions concerning net worth, it would have constituted a useless gesture, and possibly an offensive one to Judge Withey, for petitioners' counsel to ask another question along the same line. Further, the offer of proof

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[3] The record and Tax Court's findings of fact show there was no *specific* disallowance of *total* losses. Instead, the losses sustained on days when operations resulted in a net gain were recognized completely.

as to the particular question concerning the cost of petitioner's family food costs for one month would, standing by itself, add nothing since it was the entire line of testimony which was required to show what petitioner's personal disbursements were during the taxable year.

Petitioners suggest that when the objection made by respondent to the materiality and relevancy of the entire line of questioning was sustained, it could only be concluded that further questions along the same line would be rejected.

SUMMARY

Aside from the previous contentions concerning the Tax Court's decision, after remand by this Court, there are several other miscellaneous but important points upon which petitioners believe some attention should be focused before this appeal is determined.

Certain language from the record of this case lends support to the conclusion that something other than petitioners' correct tax liability was involved when the Commissioner acted in this case. For instance, respondent's opening statement emphasized that:

> " . . . this was somewhat of a test case to see how far a person engaged in the betting and booking business may operate without keeping the usual records which are kept by a merchant and a man in business, . . . so that he (the Commissioner) could *check the return of the man who is alleged to have received such amounts . . .* " (R. No. 14760 at 40) (Emphasis supplied.)

Again, the U. S. Internal Revenue Agent stated in explaining why the "Loss" column entries were ignored:

> " . . . they wanted to test it out whether proper records should be kept in the case." (R. No. 14760 at 51)

These phrases indicate that the method by which petitioner kept his records of betting transactions impeded the efforts by the Commissioner of Internal Revenue to obtain leads which could result in the investigation of other taxpayers who placed bets with petitioner. While such a result probably is a desirable social objective,

what relationship does this investigative objective have to do with the proper determination of petitioner's income which is all that is involved under the Internal Revenue Code? When an operator of a "pin ball" machine pays a winner or a Las Vegas slot machine pays, there is no record of the name and address of the winner obtained by the owner of either machine. Nor is any required by the Internal Revenue Code. Furthermore, as the Tax Court itself said in a similar case, such information would add nothing because the winner would probably supply a fictitious name. *Ross v. Commissioner,* 15 TCM 23, Dec. 21, 511 (M), T.C. Memo. 1956-5. Yet is is the absence of this unnecessary information which the Tax Court says, in this case, was fatal to petitioners even though its absence was not fatal to the sustaining of a notice of deficiency based solely on the same set of facts.

Petitioners believe that the determination of a taxpayer's income tax liability cannot be based on half of his records because those records do not supply investigative leads to the returns of people to whom he paid money. The U. S. Internal Revenue Code is designed to ascertain the correct tax liability of each taxpayer. It should not be used to enforce a moral code to which many Americans do not subscribe. This is particularly true in view of the official recognition accorded to professional gambling by the Internal Revenue Code provision which requires a payment of a special tax by persons engaged in receiving wagers. Section 4411 of the Internal Revenue Code of 1954.

Under the law of Arizona, as announced by its Supreme Court, the booking of bets on football, basketball and baseball games does not constitute illegal conduct. *Engle v. State of Arizona,* 1939, 53 Ariz. 458. There the Supreme Court of Arizona stated that Arizona law does not prohibit gambling per se. The Court's opinion held that a mechanical instrument or devise determining who won or lost was an essential prerequisite to the application of the criminal gaming statute. Yet the practical effect of the Tax Court's decision (an administrative agency of the Executive branch of the Federal government) is to outlaw activity which Ariona's

law permits. This is so because no bookmaker can engage in such activity if he must pay a Federal income tax based on only that half of his records which reflect daily winnings while the other half reflecting daily net losses are rejected. If this is desirable tax policy, it would seem reasonable to conclude that Congress would not have granted petitioners the legal basis upon which gambling losses may offset gambling winnings. Section 23 (h) Internal Revenue Code of 1939.

Next, reference is made to a statement in Judge Chambers' majority opinion which may indicate that this Court's majority was concerned about the nature of one of petitioner's occupations. It was at pages 151 and 152 and is as follows:

> "Of course, the purpose of justice is to ascertain the truth. But how, as a practical matter can a fact trier ever be *quite sure* he has got the truth *in a case like this.*" (Emphasis supplied.)

Petitioners respectfully submit to the Court that the adversary process (plaintiff vs. defendant) presents the factual material to the trial judge upon which a decision is reached. If one of the parties puts on absolutely no evidence and relies exclusively upon a legal presumption of prima facie correctness, should the trial court then decide the case on the record before it or sustain the suspicions of the party who put on no evidence? Petitioners offer the contention that it is neither the duty nor the proper function of a trial judge to decide a case on the basis of anything other than the record before him. The facts in the record are exclusive, and decisions or findings of fact which are not based on that record but on a fear or suspicion by the trial judge that he has not got the truth are bound to make the rules respecting evidence and burdens of proof meaningless. Consequently, petitioners hope the Court will not be concerned by a fear that the fact trier could not be quite sure he has got the truth in a case like this. If a trial judge must always be made quite sure he has the truth before he may find for one party as against the other, it is doubtful if many decisions could be reached or lawyers found to litigate the case. Truth is often a matter of perspective. It is the angle of vision

which matters. If the taxpayer's burden of proof requires that he persuade a trial judge that the latter is quite sure of the facts, independent of the record, it is unlikely that many taxpayers could ever prevail against the Commissioner in the Tax Court. And in this case suppose that the petitioners had maintained the daily individual bet slips? Would the Tax Court be quite sure in that event that petitioners realized no additional income when it has already said that such information would probably add nothing. *Ross v. Commissioner, supra.* The only way the Tax Court could be made quite sure would have required the records and testimony of every individual who placed a bet with petitioner, and even then the question would arise as to whether the Tax Court would have believed those individuals.

Therefore, it is submitted that cases should not be decided upon a trial judge's concept of truth but on the facts before him as adduced at the trial. The purpose of justice, as it is sought by means of the judicial process, is to make sound decisions based on the facts presented at the trial under the rules of evidence and procedure then in force. Any other test is unworkable because it assumes an infallibility which human beings do not possess. No human being could ever be quite sure of the truth in this case or in any other case for that matter. Instead the trial judge must equate truth, if truth is his goal, with the record before him. And in this case the record supports only the petitioners because the Commissioner put nothing in the record either in the form of direct positive evidence or via cross examination.

A third factor which is significant is the Tax Court's processing of this case. When the Tax Court's first majority opinion announced the rule that conclusive proof was required from petitioners after being told by the Commissioner that the matter was a "test" case, the full court isued a regular opinion which was officially published. *Showell v. Commissioner,* 1594, 23 TC 495.

In that opinion fourteen Tax Court judges who were not present at the trial and who have never seen the petitioner Showell or

other witnesses found as fact that they believed petitioner only to the extent of $3,000.00 more than the Commissioner. On the other hand, the trial judge, Judge Withey, along with one other Tax Court judge, in another opinion, clearly showed that he believed it was impossible for petitioner to sustain his burden of proof without the daily individual bet slips. Thus, belief of the testimony made no difference to Judge Withey since the taxpayer had not maintained daily records which the trial judge concluded were an essential prerequisite to carrying the burden of proof.

However, after this Court remanded the case for sharper and more definitive findings of fact along with the statement that conclusive proof was not required of a taxpayer, the case became a memorandum opinion not officially published. Further, the opinion was written by a Tax Court judge who did not preside at the trial but is unconvinced by the *"record."* In other words, the Tax Court judges who did not observe the demeanor of the witnesses refuse to find that they did not believe the testimony. The only judge who can actually say whether he believed the witnesses or not, Judge Withey, no longer is active in the disposition of the case, probably because his earlier opinion indicated he did not think it involved the issue of credibility of the witnesses but failure to maintain certain records without which petitioners could not prevail.

Whether the Tax Court should be sustained on the ground that it had the right to disbelieve the testimony when it refuses to say it disbelieved the testimony and when the Tax Court judges who are unconvinced by the record never observed the witnesses is more than questionable it seems to petitioners. It may be true that a trial judge has the right not to believe testimony, but does this principle apply when:

(1) The Tax Court judge writing the opinion refuses to make such a finding, and

(2) The Tax Court judge writing the opinion was not the trial judge and never observed the witnesses, and

(3) The Tax Court judge who heard the case remains silent after indicating earlier that belief had nothing to do with the case, and

(4) The record is devoid of evidence to the contrary.

If this case is to be decided by the Tax Court, upon the unwritten premise that professional bookmakers, as a class, or this particular petitioner, as a member of that group, cannot be believed with respect to their income tax matters, whereas people engaged in other occupations can be believed, it should have been a simple matter for respondent's counsel to expose such proclivities on cross examination. Also, if that is the case, why did the Commissioner assert a deficiency based solely on the record maintained by such an individual? Further, if such a premise is correct, how does it avoid the testimony of Houston L. Walsh who was a nurseryman and City Manager? If the testimony of taxpayers is accepted or rejected, by reference to their occupation, should not some evidence be offered by the Commissioner to support the proposition that gamblers as a class are suspect when their testimony concerning their own income tax is involved? In recent years some Americans have been sent to jail for perjury upon the testimony of paid informers and ex-Communists, but their convictions were not set aside on the ground that uncontradicted testimony of such witnesses is per se unbelievable. If the United States can carry its burden of proving criminal guilt beyond a reasonable doubt in such cases, it would appear to follow that uncontradicted testimony must be followed even though one of the witnesses was engaged in the business of wagering.

Fourthly, it is significant to note the suden emergence of the *Cohan* case, *supra,* as a factor. This well-known decision, which was not mentioned by Judge Tietjens in the Tax Court's first opinion, was brought to the side of the stage by respondent's counsel in his brief filed in the first appeal before this Court. There it was argued that the Tax Court's decision was based:

" . . . apparently on the theory of *Cohan v. Commissioner,* 39 F. 2d 540 (C.A. 2d)." (Res.'s Br. No. 14760 at 8).

Thereafter, it was relied on by Judge Tietjens in the second memorandum opinion. Petitioners submit that the Tax Court is composed of able judges who do not overlook authority for their decisions. Consequently, it is suggested that the reliance upon the *Cohan* case, *supra,* was an afterthought, which does not save findings of fact and a decision which is clearly erroneous.

Fifth, it is necessary to put into perspective one of the statements made by respondent at the trial. There it was said, in an opening statement, that:

"This case here, your Honor, is one of a series of years of this taxpayer . . . " (R. No. 14760 at 40).

This is not the case. (R. No. 14760 at 57). The only other taxable year which the Commissioner of Internal Revenue has challenged with respect to petitioner's wagering income is 1948. In that year a deficiency in income tax of $1,711.86 was asserted in a statutory notice of deficiency. Thereafter, the alleged deficiency was paid, a claim for refund filed, and suit for recovery begun in the United States District Court in Phoenix, Arizona. *Showell v. U. S.* (D. C. Ariz., Dkt. No. 2185 Phx.). This suit has been stayed by the U. S. District Court pending the outcome of this appeal.

Since the Tax Court in the case before this Court has sustained deficiencies totaling $6,678.90 for the taxable year 1949, it is seen that only $8,390.76 in taxes and two taxable years are at stake.

Finally, petitioners feel it only fair that the record be clarified concerning the status of Houston L. Walsh as a disinterested witness. In the Tax Court's opinion, Judge Tietjens refers to him as Showell's "accountant." This is not correct unless that label is applied to anyone who assists a taxpayer in the use of an adding machine and who verifies daily totals. It seems to petitioners that this method of discrediting Walsh's testimony is indicative of the

weakness of the Tax Court's entire opinion. The record clearly shows that Mr. Walsh merely shared an office with petitioner in 1949, and there is absolutely no testimony that he was an accountant of any kind much less petitioner's accountant. In fact, he testified he was the owner of a nursery and a former City Commissioner and City Manager of Phoenix. (R. No. 14760 at 110). Nor was he in business of any kind with petitioner during 1949. Petitioners contend that the Tax Court, in a memorandum opinion written by a judge who never observed Mr. Walsh, cannot avoid the latter's uncontradicted testimony, which sustains the complete accuracy of Exhibit 3, simply by incorrectly referring to him as petitioner's accountant.

CONCLUSION

The decisions of the Tax Court in the instant cases are erroneous and should be reversed .

Dated: Phoenix, Arizona

December 10, 1957.

Respectfully submitted,

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APPENDIX

EXHIBITS

Page references are to Transcript of Record No. 14760

PETITIONERS'	IDENTIFIED	OFFERED	RECEIVED
1	42	42	42
2	42	42	42
3	43	44	44
4	65	65	66
5	66	66	66
6	67	67	67
7	69	70	70
8	72	72	72
9	75	76	76
RESPONDENT'S			
A	117	117	117
B	117	117	117

NO. 15710

IN THE

UNITED STATES

COURT OF APPEALS

For the Ninth Circuit

JACK SHOWELL AND DOROTHY SHOWELL,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONERS
On Petition for Review of the Decisions of the Tax Court of the United States

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TABLE OF AUTHORITIES CITED

NO. 15710

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ARGUMENT

I

Respondent has not submitted a reply to any of the six or more arguments, contained in Point I of petitioners' opening brief, in support of their conclusion that the Tax Court memorandum

opinion of January 31, 1957, did not comply with the majority opinion in *Showell v. Commissioner,* 9 Cir., 1956, 238 F. 2d 148. Instead, and as will be shown herein, respondent's brief from pages 6 through 10 answers arguments which were not made by petitioners, consumes pages 6 and 7 summarizing this Court's majority opinion, absorbs most of pages 8 through 10 restating the Tax Court's opinion, and offers conclusions which are based solely on the foregoing. Petitioners ask the Court, in the interests of appraising both the relevance and the substance of the merits of respondent's answers to note how this avoidance has been accomplished.

In Point I of petitioners' brief, it was pointed out that the following language established the reason why this Court remanded the case and what the Tax Court was ordered to do:

> "The *only* thing that justifies the conclusions reached by the Commissioner or the Tax Court is disbelief or dissatisfaction with *the testimony.* Yet *the findings* are not sharp enough to tell us this. . . .
>
> "The remand will therefore be on the ground that *the findings* were not sufficiently definitive" (Emphasis supplied)

This is clear language. It says to the Tax Court: (1) If you are going to decide the case the way you have, the only way you can do it is to make *findings* that you disbelieved or were dissatisfied with *the testimony;* and (2) the case is now remanded to you for *findings* which are sufficiently definitive. It is this mandate which petitioners contend has not been complied with for the six reasons set forth in Point I of their opening brief.

However, respondent has avoided answering by selecting certain sentences of this Court's majority opinion, and then concluding that the objections therein voiced have been overcome by the Tax Court's *decisions.* However, respondent never deals with the primary issue of whether the Tax Court has made findings of fact that it disbelieved or was dissatisfied with *the testimony* and whether *the findings* were sufficiently definitive. That is why the first two paragraphs of pages 6 and 7 of respondent's brief are required. They carefully select the sentences from the majority

opinion which are later to be "answered". And it is for this reason that petitioners dispute the conclusion found in respondent's brief immediately after page 6 and most of page 7 that:

> "It is in this posture, then, that the instant petitions for review must be considered in order to determine whether the Tax Court decisions are proper in view of the prior remand." (Respondent's brief, 7).

No doubt such "posture" aids respondent's cause, but it is not responsive to the issue presented to the Court.

Immediately after the above quotation, and on page 7 of his brief, respondent initiates the "answer" portion of his argument by saying that "the Tax Court has *properly* exercised its prerogatives as the trier of fact" and "its decisions are correct in view of the prior opinions of this Court". This is an unsupported conclusion and statement of preference, and, as such, should be ignored.

Next, at pages 7 and 8, respondent states that the Tax Court has *now* made it plain that the issue is a factual one. But what is the relevance of this statement? How does it serve as an answer to petitioners' reasons why the Tax Court's findings do not comply with this Court's mandate. Also, it is not correct for respondent to leave the inference, by the use of the word "now", that this statement of the Tax Court is something new. After all, in its first regular opinion, the Tax Court stated: "As we see it, the question resolves itself into one of fact, . . ." *Showell v. Commissioner,* 1954, 23 TC 495.

Following the above observation, respondent next argues, at page 8, that the Tax Court's "memorandum findings of fact *and* opinion no longer contain the inconsistency which existed in the prior findings of fact and opinion." This "answer" is offered in reply to respondent's conclusion in the last sentence of the first paragraph on page 6 that:

> "As a result, then, of this *inconsistency* and of the reportorial nature of the Tax Court's finding this Court remanded to the Tax Court." (Emphasis supplied)

The above quoted sentence, which was a prerequisite to an "answer" that the inconsistency no longer exists, may reflect the unrest felt by this Court after reading the Tax Court's first findings of fact at 23 TC 495. However, this Court did not send the case back to the Tax Court simply for the purpose of making the facts consistent with the decision. Is it an answer to petitioners' argument that the Tax Court did not find as fact that the testimony of the witnesses was disbelieved or was unsatisfactory for respondent to say that the findings of fact and opinion no longer contain the inconsistency which existed in the prior findings of fact and opinion? Petitioners were under the impression that this Court was disturbed about the apparent inconsistency between the findings of fact and the decision, and therefore ordered findings of fact which were sufficiently definitive. Has this failure to find facts sufficiently definitive been remedied when respondent points out that the findings of fact *and* opinion are no longer inconsistent? This Court did not order that the Tax Court's opinion be reworded so that it would be consistent with the decisions. It ordered sufficiently definitive findings among which would be the finding that the Tax Court disbelieved or was dissatisfied with the testimony should the Tax Court decide the case again as it did before. This was not done, but respondent answers by saying it does not matter because the findings of fact *and* opinion are now no longer inconsistent. This is neither an answer nor relevant.

The next contention by respondent is that the Tax Court has now stated it was unconvinced. Yes, but where is this statement made, and what is the Tax Court unconvinced about? The statement is not a finding of fact at all. It is not a *finding* of fact that the Tax Court *disbelieved* or was dissatisfied with *the testimony.* Nor did respondent quote the qualifying words of the opinion which were: "On this record we are unconvinced." Respondent has answered none of petitioners' contentions found at page 12 of their opening brief.

Next, the respondent explains that this time the Tax Court "has carefully refrained" from making any findings of fact concerning

Exhibit 3, and has only found that the books and records were inadequate. If so, what is the deficiency itself based on? The only basis of the statutory notice of deficiency has thus been eliminated once the presumption of prima facie correctness disappeared. Since the examining agent testified that the sole basis of the deficiency was the figures appearing in the Gain column of Exhibit 3 less four items appearing in the Loss column, what are the facts which remain as the basis of the additional income? It is all right to enunciate the legal truism that deductions must be proved, but what happened to the source of the deficiency itself? Respondent is now asking this Court to sustain a deficiency having no basis in the finding of fact and which clearly only rests upon a legal presumption of correctness. In this Court's majority opinion, Judge Chambers gave the Tax Court the benefit of the doubt by saying that perhaps there was an implied finding that the testimony was unsatisfactory. Now the respondent is asking the Court to sustain the Tax Court although it has "carefully refrained" from making *any* findings of fact concerning the exhibit which served as the sole basis of the Commissioner's deficiency.

Respondent's next statement, at pages 8 and 9, that the Tax Court found that petitioner did not maintain regular, adequate and permanent books and records is simply a restatement of one of the findings of fact, and cannot rebut or answer arguments to the effect that the Tax Court's findings were not sufficiently definitive.

Next, respondent "answers" by stating at page 9, that the Tax Court has "carefully considered" this Court's opinion and has applied the legal principles contained therein. Again this is simply a statement of preference and unsupported conclusion. Furthermore, it is not any answer to petitioners' specific grounds for asserting the Tax Court did not comply with this Court's mandate.

Immediately thereafter, at page 9, respondent "answers" by saying that: it is the taxpayer's burden to prove error in the Commissioner's determination, only Exhibit 3 was offered to support that burden, and therefore the Tax Court could "on this record" remain unconvinced. Not only does this reason fail again to answer the

charge that the *findings* are not sufficiently definitive and do not find that *the testimony* was disbelieved, but it is not a correct statement of the law nor a correct paraphrase of the Tax Court's opinion.

To begin with, the Tax Court arrived at its burden of proof by the following procedure. First, it said: "As indicated by the opinion of the Court of Appeals herein, the burden is on the taxpayer to sustain by competent evidence his claimed deductions." Then the Tax Court said:

> "In other words, it is the petitioner' burden to prove error in respondent's determination, . . ."

But is this statement by the Tax Court correct?

The burden of proof is different from the legal presumption of correctness that attaches to the Commissioner's determination. Thus, when contrary evidence is placed into the record the presumption of prima facie correctness is gone completely and the case is wide open. *J. M. Perry & Co. v. Commissioner,* 9 Cir., 1941, 120 F. 2d 123; 9 Mertens, Law of Federal Income Taxation, §50.71 (1943). Here there was *nothing but contrary evidence* in the form of testimony from two witnesses and Exhibit 3. Also, the Tax Court itself disregarded the Commissioner's determination. Thus, it cannot be disputed that the legal presumption of prima facie correctness attaching to the Commissioner's determination evaporated, and, consequently, could not be treated as evidence. *Hemphill School, Inc. v. Commissioner,* 9 Cir., 1943, 137 F. 2d 961. Therefore, the only question left is what is the taxpayer's burden of proof and has it been carried?

The Tax Court says the taxpayer must prove the Commissioner's determination is erroneous. Although petitioners accomplished this as evidenced by the Tax Court's finding that the deficiency was incorrect, this is not a correct statement at all as to what constitutes the burden of proof in tax cases. In order to carry his burden of proof, a taxpayer must prove his facts before the court by a "preponderance of the evidence" (*Schilling Grain Corp.,* 1927, 8

B.T.A. 1048) such as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money (*Burnet v. Niagara Falls Brewing Co.,* 1931, 282 U.S. 648, 51 S. Ct. 262, 75 L. Ed. 594). The burden of proof means that where the evidence *is in even balance* and the tribunal cannot say which would win, the party upon whom rests the burden of proof will lose. CCH Procedure and Practice Before the Tax Court of The United States, §299 at page 135 (17th ed. 1957). In this case there was no evidence at all in support of the Commissioner once the presumption of prima facie correctness disappeared. Consequently, the preponderance of evidence must have been in favor of petitioners. And how could the burden of proof rule be invoked against petitioners if it simply means they lose *if* the evidence *is in even balance.* There could be no even balance in this case because the Commissioner introduced no evidence of any kind.

Consequently, what is the Tax Court saying when it says the taxpayer must prove the Commissioner's determination is erroneous? If it is implying that something more than a preponderance of the evidence is required, it is wrong. On the other hand, if it is saying that petitioners did not have a preponderance of the evidence, it is ignoring the entire record. Surely it cannot be saying all of petitioners' evidence must be disregarded as not competent in view of the fact that: (1) All of it was admitted into evidence without objection by respondent, (2) Exhibit 3 served as the sole basis of the Commissioner's determination, (3) The testimony was uncontradicted, and (4) All of the evidence, testimony and documents, served as the basis of its first lengthy findings of fact at 23 TC 495. If the rejection is on the basis that uncontradicted testimony and a document upon which the Commissioner based his deficiency does not constitute competent evidence, then what the Tax Court is actually holding is that it was impossible for petitioners to carry their burden of proof without the daily individual bet slips. Since that is precisely what the trial judge's dissenting opinion in 23 TC 495 held, it is clear that we are back either to the erroneous rule that a taxpayer must conclusively prove the losses to carry his

burden of proof, or the equally erroneous rule that it was *impossible* to carry his burden of proof without the daily bet slips. In view of the fact that even respondent refused to support the trial judge's theory and this Court's majority opinion denied the conclusive proof requirement, what is left when, upon the basis of the foregoing statement, the Tax Court stated that on this record it was unconvinced. It was saying, in different words, you did not give us conclusive proof or it was impossible for you to carry the burden of proof without the daily bet slips.

One other point which petitioners emphasize is that the Tax Court did not say the *only* evidence offered by petitioners was Exhibit 3. It said:

> "To sustain that burden the petitioner relies *almost* exclusively upon his own testimony and that of his accountant." (Emphasis supplied)

Even the Tax Court acknowledged the testimony of petitioner Showell and Houston L. Walsh which respondent constantly avoids. Also, it is important to point out that the petitioners offered voluminous "net worth and disbursements evidence" which the Tax Court refused to admit saying it was not relevant or material. Thus, when petitioners relied only on the testimony of petitioner Showell and Mr. Walsh, and Exhibit 3, it was not by choice, but because the Tax Court refused to admit net worth and disbursements evidence as not relevant or material even though it found as fact that petitioners' books and records were inadequate.

At page 9, respondent further summarizes the Tax Court's opinion pointing out it did believe that Showell suffered some losses. Where is the competent evidence to support this belief? Also, the corollary thereto, that the Tax Court finds as fact that it disbelieved the testimony, will not be found.

Next, at pages 9 and 10, respondent says that this Court indicated "that if there had been a Tax Court finding that the testimony was not satisfactory," the decision could stand. Then he points out that the Tax Court in its findings *and* opinion has

stated "the evidence is unsatisfying". This is somewhat misleading. The statement is found in the opinion and not in the findings, and it refers to the "evidence" whereas this Court's majority opinion stated that the only thing which justifies the conclusions is disbelief or dissatisfaction with *the testimony.* That is why petitioners contend the Tax Court is simply restating its previously announced rule that conclusive proof is required. Furthermore, the Tax Court did not say that it was unconvinced by the record that Exhibit 3 was an accurate statement of petitioner's bookmaking business. Instead, it said, in its opinion, and not as a finding of fact, that:

> "On this record we are unconvinced that the petitioner suffered wagering losses to the extent claimed."

Respondent slides over the phrase "on this record" which petitioners have discussed in support of one of their contentions at page 14 of their opening brief.

Finally, respondent answers one of the sentences from this Court's majority opinion which said the Tax Court should make it clear that this case does not establish an overriding precedent that a taxpayer without certain records cannot overcome the burden of proof. The answer, according to respondent, is the Tax Court's statement that this is a fact case. But as pointed out earlier, this statement was made in the first regular opinion at 23 TC 495, and if such a statement was sufficient answer Judge Chambers would certainly not have told the Tax Court to make it clear. Furthermore, all cases are fact cases when it comes to determining income. What does such a statement add to the first opinion?

It is upon the basis of the foregoing arguments and the complete failure to respond to petitioners' contentions that respondent reaches the conclusion that the Tax Court's decision is in complete accord with this Court's mandate. For the reasons set forth in Point I of petitioners' opening brief and herein, and in view of respondent's failure to answer, it is submitted that petitioners should be sustained as to this assignment of error.

II

Respondent's second point is a three and one-half page reply to the contentions supporting petitioners' Points II through VI contained in pages 16 through 39 of the opening brief.

Although a few arguments are made, respondent's basic answer is the notion that the petitioners should not be permitted to raise the *same* questions raised in the first appeal since this Court's decisions have become the law. Before turning to the issue of whether the questions raised in these latter five points of petitions' brief are the same, it is necessary to determine whether this Court's power to review is limited after it sends a case back to the court below for findings of fact which are sufficiently definitive.

The only case cited by respondent is *Todd v. Commissioner,* 9 Cir., 1948, 165 F. 2d 781, while petitioners cited *McGah v. Commissioner,* 9 Cir., 1954, 210 F. 2d 769 in support of the proposition that the present appeal is in the nature of a rehearing. In the 1948 *Todd* case, *supra,* this Court sustained the validity of a formula adopted by the Tax Court to determine the respective contributions of the taxpayers' separate and community property, but sent the case back to the Tax Court because of the lack of certain findings. On the first appeal, the taxpayer disputed the validity of the formula used by the Commissioner in ascertaining the respective contributions of the taxpayers' separate and community property and their personal activities to their partnership income, which formula had been sustained by the Tax Court. This Court held that the formula adopted was a rational one and remanded the case to the Tax Court for further findings respecting attributions to capital and to the taxpayers' management of the business, and a new decision. On the second appeal, the taxpayers again attacked the formula without more. Thereafter, on the second appeal, this Court held that the validity of the formula had already been determined. On the other hand, in the *McGah* case, *supra,* Judge Orr remanded with instructions to the Tax Court to make further findings and enter such decision as it deemed proper. Upon remand, the Tax Court took no additional evidence. This Court, on

a second appeal, said at page 770: "Our mandate in this case was, in essence, a directive for a rehearing. We directed the Tax Court to make findings on the issue of whether the 14 houses were held for sale for a time prior to sale, and if so, when and how long they were so held, and to enter such decision as it deemed proper. The Tax Court had the power, if it deemed necessary, to take additional evidence and make such determination thereon as the facts warranted. . . . The fact that the Tax Court felt itself able to comply with the directive on the record then before it does not change the character of the proceeding. The petition for review was timely." Following this statement the Ninth Circuit proceeded to reverse the decision of the Tax Court holding that it was free to draw its own inference from uncontroverted evidence and reverse the Tax Court's findings and conclusions if necessary.

Here the Court sent the case back to the Tax Court for findings which were sufficiently definitive. If so, how can it be said that assignments of error arising out of these *new* findings cannot be reviewed by this Court.

For instance, petitioners' Point II raises the contention that in view of the new finding of fact that petitioners' books and records were inadequate, the Tax Court erred in sustaining a determination of income which was not based upon a *method* as required by Section 41, Internal Revenue Code of 1939. How does this Court's majority opinion in *Showell v. Commissioner,* 9 Cir., 1956,238 F. 2d 148, decide that issue which arose out of this finding of fact which was not made in the Tax Court's regular opinion at 23 TC 495? Also how does this Court's majority opinion control Point III which raises the issue of whether such a finding of fact constitutes error in view of the fact there was no such finding in the Tax Court's first opinion. Third, petitioners contend in Point IV that the Tax Court's new finding of fact that petitioners realized additional income of $19,563.66 is clearly erroneous since it is not supported by the evidence. This assignment of error is based upon what the Tax Court did after the remand, and clearly is reviewable. Next, petitioners argued in Point V that the Tax Court's new

findings of fact and opinion reflect that the Tax Court misapplied the burden of proof rule in reaching its decisions after remand. This too is reviewable. And lastly, in Point VI, that the Tax Court erred in refusing evidence concerning petitioners' net worth and disbursements in view of its new finding that petitioners' book and records were inadequate. This, too, is certainly a question which the Court may review in the light of the Tax Court's findings after remand.

It is true that many of the arguments supporting these assignments of error are like those made in the first appeal, but they are now to be viewed in light of the Tax Court's new findings of fact which give rise to the assignments of error. For respondent to fail to answer Point II through VI and urge that the Court should not review these points is fairly close to an admission that there were no answers to be submitted. What respondent is saying is that if a petitioner wishes to protect his record for a subsequent petition for a writ of certiorari, he must so petition before this Court has enough facts upon which it can intelligently decide the case. However, the significant factor here is that the issues raised in this appeal, as set forth above, have not been decided by this Court for the reason that they arise out of the Tax Court's new findings of fact and memorandum opinion.

In Point II of their opening brief, petitioners submitted that the determination of income must be in accord with some method once the Commissioner has found the books and records inadequate, as required by Section 41, Internal Revenue Code of 1939. Respondent replies by saying that the Commissioner did not change the taxpayer's method of accounting. This is not responsive. Petitioners did not say that the Commissioner changed his method of accounting, but did say that no method was used to determine his income as required by Section 41. Also, is it reasonable to say that the Commissioner has not changed a taxpayer's method of accounting when he disregards one-half of the latter's records, and determines income without the use of any method?

Furtherfore, it makes no difference whether Section 41 refers to a method of accounting or simply a method of determining income. In either case, the Commissioner has failed to adopt a method. Nor is the failure to comply with Section 41 resolved by the truism that the Commissioner put the taxpayers to their proof. The only proof taxpayers are put to is the burden of proof in the Tax Court, and that burden has been carried in this case.

Furthermore, this whole matter of referring to this case as one involving specific disallowance of claimed deductions needs clarification. This case involves the issue of whether or not the Tax Court may find as fact that a taxpayer's books and records are not regular, adequate and permanent, when the sole basis of the Commissioner's notice of deficiency is the accuracy of certain columns contained in those same inadequate, impermanent and irregular books and records. Respondent has failed to reply to the substance of petitioners' contention that the Tax Court may not sustain a determination of income which is not based on any method of ascertaining income because Section 41 has been violated.

On page 11 of petitioners' opening brief it was stated that the Tax Court will not find as fact that it disbelieved or was dissatisfied with the testimony because the Tax Court does not wish to raise the issue as to how such a finding was made in view of the fact that the Tax Court Judge who spoke for the majority did not observe the demeanor of the witnesses. Respondent does not answer this suggestion, but quoted from this Court's opinion that: "The fact trier had the right to remain unconvinced." But this is not the problem. The fact trier, Judge Withey, stated clearly that insofar as he was concerned, it made no difference whether the witnesses were believed or not. This was due to his opinion that it was impossible for the taxpayers to carry their burden of proof without the daily bet slips. That is why he said "that if the record justifies the allowance of any losses in excess of those allowed by respondent it justifies the allowance of the full amount of losses contended for by petitioners." However, since it was his view that

petitioners coud not carry their burden of proof without the daily bet slips, petitioners should be entitled to nothing.

Next, respondent argues that the Tax Court could not have imposed a standard of conclusive proof since if it had done so there would have been no basis for the Tax Court's allowance of $3,000.00 in addition to the amount allowed by the Commissioner. Yet that is precisely what the Tax Court said in its first regular opinion when it said: "We cannot accept the evidence as conclusive proof of the full amount of the claimed losses."

Again, on page 12, respondent reiterates the statement that petitioners urge that Exhibit 3, standing alone, establishes the existence of losses. This is simply not a correct statement. Petitioners offered the testimony of petitioner Showell and Houston L. Walsh, as well as Exhibit 3, and offered to prove by net worth and disbursements evidence that the additional income asserted by the Commissioner could not have been realized. Furthermore, as this Court will remember, petitioners' counsel argued in the briefs filed in the first appeal herein that the real issue is whether or not the petitioners sustained the additional income asserted by the Commissioner of Internal Revenue, and that books and records are evidence of the facts but are not the facts themselves. It was there contended that the existence or absence of a book or record is not controlling since such a rule would elevate a document (evidence of a fact) to the status of fact itself. Seemingly, this Court's majority opinion in *Showell v. Commissioner,* supra, agreed with this conclusion when it stated that "the only thing that justifies the conclusion reached by the Commissioner or the Tax Court is disbelief or dissatisfaction with the testimony." The basic question before the Tax Court was not whether or not petitioners had maintained books and records sufficiently detailed to satisfy the Commissioner of Internal Revenue. The question there was whether or not petitioners sustained the alleged additional income asserted by the Commissioner. The answer to that question did not depend upon the absence of certain specific daily records, but may

be ascertained by means of any evidence upon which a taxpayer's taxable income can be determined, including net worth and disbursements evidence and the testimony of witnesses. Therefore, to say that the basic question is whether Exhibit 3 is an accurate record of Showell's bookmaking activities is to confine the issue too narrowly, unless, as petitioners have suggested several times in this case, the Commissioner asserted additional income against petitioners as punishment for not maintaining records satisfactory to him. One thing is certain. The issue before this Court is not limited to the question of whether Exhibit 3 is an accurate record of Showell's bookmaking activities. The basic question before this Court is whether or not petitioners have carried their burden of proof as it is defined by case law, whether or not there is any substantial evidence in support of the Tax Court's findings of fact, and whether or not the Tax Court has incorrectly applied the applicable law.

At page 13, respondent pleads that the Tax Court was forced to deal with evidence that it did not consider satisfactory and therefore should not be criticized for reaching a result which it believes is correct on the record before it. However, this lack of additional evidence was a deed of the Tax Court's own choosing since it refused to admit the net worth and disbursements methods evidence although at the same time it was finding as fact that the petitioners' books and records were inadequate. Furthermore, if a trial court is to be sustained simply because it believes what it did was correct on the record before it, there would be no point in any litigant appealing to this Court. The question is whether or not, in the opinion of this Court, The Tax Court acted correctly under the applicable rules of evidence, procedure and substantive law.

Petitioners point out again that the briefs filed by respondent in this case are unresponsive to the arguments contained in petitioners' opening brief. The fair inference to be drawn from such

failure to respond is that the arguments contained in petitioners' opening brief were not susceptible of an answer.

Dated: Phoenix, Arizona
February 6, 1958

Respectfully submitted,
W. LEE MCLANE, JR.
NOLA MCLANE
Counsel for Petitioners

MCLANE & MCLANE
Of Counsel

No. 15711

United States
Court of Appeals
for the Ninth Circuit

ARTHUR TUGGI BRUNNER, Appellant,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—11-11-57

No. 15711

United States
Court of Appeals
for the Ninth Circuit

ARTHUR TUGGI BRUNNER, Appellant,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the United States District Court, Southern District of California, Central Division

No. 19880-Y

ARTHUR TUGGI BRUNNER, Plaintiff,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California, Defendant.

COMPLAINT FOR JUDICIAL REVIEW OF ORDER OF DEPORTATION

Plaintiff, Arthur Tuggi Brunner, complains of the defendant and for cause of action alleges:

I.

This complaint is filed and these proceedings are instituted against the defendant pursuant to Title 28, U.S.C.A., Section 2201 and Title 5, U.S.C.A., Section 1009, for a judgment declaring that plaintiff is not deportable from the United States.

II.

The plaintiff is a resident of the County of Los Angeles, State of California, within the jurisdiction of this Court.

III.

The defendant, Albert Del Guercio, is the duly appointed, qualified and acting District Director of the Immigration and [2] Naturalization Service,

Department of Justice, Los Angeles, California; that William G. Munro, Special Inquiry Officer, Immigration and Naturalization Service, Miami, Florida, and the members of the Board of Immigration Appeals, Washington, D. C., are, and at all times herein complained of were, executive officials within the Department of Justice.

IV.

The plaintiff is a native and citizen of Switzerland, 30 years of age, who was lawfully admitted to the United States for permanent residence on October 15, 1949, and who has resided continuously in the United States since that time; that he last arrived in the United States at Honolulu, Territory of Hawaii on April 23, 1953 as a member of a United Service Organization show troupe.

V.

On or about January 17, 1955, there was served upon the plaintiff a warrant of arrest issued by the Immigration and Naturalization Service directing that plaintiff be taken into custody and granted a hearing to show cause why he should not be deported from the United States; that pursuant to such warrant, a hearing was accorded the plaintiff by William G. Munro, Special Inquiry Officer, at Miami, Florida on February 25, 1955; that on or about March 21, 1955, the said Special Inquiry Officer, William G. Munro, after making findings of fact and conclusions of law, ordered that the deportation proceedings in this case be terminated,

but certified the case to the Board of Immigration Appeals for its consideration.

VI.

On or about August 30, 1955, the Board of Immigration Appeals directed that the order of the Special Inquiry Officer, dated March 21, 1955, be withdrawn, and without preparing new findings of fact or conclusions of law, determined that plaintiff is subject to deportation on the charge stated in the warrant of arrest, i.e.:

"(1) That under section 241(a)(1) of the [3] Immigration and Nationality Act, he is subject to deportation because, at the time of his entry at Honolulu, Territory of Hawaii, on April 23, 1953, he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, Aliens who are ineligible to citizenship under section 212(a)(22) of the said Act."

VII.

On or about December 22, 1955, a warrant directing plaintiff's deportation from the United States was issued by the Immigration and Naturalization Service, but no order of deportation was ever issued.

VIII.

On or about December 29, 1955, a motion to reconsider plaintiff's case, filed by his counsel, was forwarded by the Immigration and Naturalization Service to the Board of Immigration Appeals, Washington, D. C., and the motion to reconsider

was denied by the said Board on or about February 24, 1956.

IX.

The deportation proceedings conducted in plaintiff's case were unfair, constituted a denial of due process of law and there is no reliable, probative and substantial evidence in the deportation record sustaining the charge upon which plaintiff has been ordered deported, for the following reasons, among others:

1. That the findings of fact and conclusions of law and order terminating the deportation proceedings promulgated on March 21, 1955 by William G. Munro, Special Inquiry Officer, are binding upon the Board of Immigration Appeals and may not be set aside.

2. That the Government should be estopped [4] from predicating plaintiff's deportation upon his last arrival in the United States on April 23, 1953 for the reason that, prior to such arrival, the Immigration and Naturalization Service had issued to him a reentry permit with full knowledge that he might be subject to exclusion upon return and failed to so advise him at the time of delivery of the reentry permit.

3. That the evidence of record in the deportation hearing does not establish that plaintiff knowingly and freely made an independent choice in executing Form SSS 130 of the Selective Service System, and thus rendered himself ineligible to citizenship.

Wherefore, plaintiff prays that the Court review the record of his deportation proceedings and enter judgment that he is not deportable from the United States on the charge contained in the order of deportation and that, pending such review, the Court enjoin and restrain the defendant from proceeding with the deportation of plaintiff.

GORDON, KIDDER & PRICE,
/s/ By MARSHALL E. KIDDER,
Attorneys for Plaintiff.

[Endorsed]: Filed May 7, 1956.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR JUDICIAL REVIEW OF ORDER OF DEPORTATION

Comes now the defendant, Albert Del Guercio, as District Director, Immigration and Naturalization Service, Los Angeles, California, and for answer to plaintiff's Complaint on file herein, admits, denies and alleges as follows:

I.

Referring to the allegations contained in paragraph I of plaintiff's Complaint, neither admits nor denies said allegations, the same being conclusions of law.

II.

Admits the allegations contained in paragraphs II, III, V and VIII of plaintiff's Complaint.

III.

Referring to the allegations contained in paragraph IV of [6] plaintiff's Complaint, denies that plaintiff has resided continuously in the United States since October 15, 1949; admits all the other allegations contained in said paragraph VI.

IV.

Referring to the allegations contained in paragraph VI of plaintiff's Complaint, denies said allegations and alleges that on or about August 30, 1955, the Board of Immigration Appeals made the following order:

Order: It is ordered that the order of the special inquiry officer dated March 21, 1955 be withdrawn.

It Is Further Ordered that an order of deportation be not entered at this time but that the alien be required to depart from the United States without expense to the Government within such period of time and under such conditions as the officer in charge of the District deems appropriate.

It Is Further Ordered that if the alien does not depart from the United States in accordance with the foregoing, the order of deportation be reinstated and executed.

V.

Referring to the allegations contained in paragraph VII of plaintiff's Complaint, denies said allegations, and alleges that on or about December 22, 1955, a Warrant of Deportation was issued by the Immigration and Naturalization Service pertaining to plaintiff.

VI.

Referring to the allegations contained in paragraph IX of plaintiff's Complaint, denies said allegations.

Wherefore, defendant prays that the Court deny the relief prayed for by plaintiff herein, and affirm the decision of the Board of Appeals of the Immigration and Naturalization Service [7] that plaintiff should be deported, for costs of suit herein, and for such other relief as the Court deems proper.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant United States Attorney,
Chief of Civil Division,

ARLINE MARTIN,
Assistant United States Attorney,

/s/ ARLINE MARTIN,
Attorneys for Defendant. [8]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 28, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED PRE-TRIAL ORDER

At a conference held under Rule 16, F.R.C.P., by direction of Wm. M. Byrne, Judge, the follow-

ing admissions and agreements of fact were made by the parties and require no proof:

(1) Plaintiff, Arthur Tuggi Brunner, is a native and citizen of Switzerland, who was lawfully admitted to the United States for permanent residence at New York, N. Y. on October 15, 1949.

(2) On or about August, 1950, plaintiff registered for military service in accordance with the provisions of the Selective Service Act of 1948.

(3) On or about April 2, 1951, plaintiff signed SSS Form No. 130, "Application by Alien for Relief From Training and Service in the Armed Forces", which document is Exhibit V in the Immigration and Naturalization file.

(4) On or about December 16, 1952, plaintiff departed from the [10] United States in possession of a reentry permit issued by the Immigration and Naturalization Service on December 8, 1952, and returned to the United States at New Orleans, Louisiana on January 3, 1953, in possession of the aforesaid reentry permit, which document is Exhibit II in the Immigration and Naturalization file.

(5) On or about April 1, 1953, plaintiff departed from the United States in possession of a reentry permit issued by the Immigration and Naturalization Service on March 18, 1953, and returned to the United States at Honolulu, T. H. on April 23, 1953, in possession of the aforesaid reentry permit, which document is Exhibit IV in the Immigration and Naturalization file.

(6) On March 21, 1955, following the completion of a deportation hearing accorded plaintiff, the Special Inquiry Officer made the following order:

"Order: It is ordered that the proceedings in this case be terminated.

The Board of Immigration Appeals has directed that this case be certified to that Board and the final order will be entered in this case by the Board. You will be allowed ten days in which to submit to this office any brief, memorandum, or request for oral argument, which you desire to be transmitted with the record in this case, for consideration by the Board."

(7) The plaintiff did not file any notice of appeal from the order of the Special Inquiry Officer dated March 21, 1955 terminating the proceedings.

(8) There is no written direction of the Board of Immigration Appeals or the Assistant Commissioner, Inspections and Examinations [11] Division, to certify this specific case to the Board of Immigration Appeals.

(9) On August 30, 1955, the Board of Immigration Appeals made the following order:

"Order: It is ordered that the order of the special inquiry officer dated March 21, 1955 be withdrawn.

It Is Further Ordered that an order of deportation be not entered at this time but that the alien

be required to depart from the United States without expense to the Government within such period of time and under such conditions as the officer in charge of the District deems appropriate.

It Is Further Ordered that if the alien does not depart from the United States in accordance with the foregoing, the order of deportation be reinstated and executed."

(10) The plaintiff did not depart voluntarily from the United States, and a warrant of deportation was issued by the District Director, Los Angeles, California, on December 22, 1955.

Issues of Fact to Be Tried

There are no issues of fact to be tried.

Issues of Law

(1) Did the Board of Immigration Appeals have jurisdiction to review and withdraw the order of the Special Inquiry Officer dated March 21, 1955, terminating the deportation proceedings?

(2) Is the Government estopped from using the arrivals of January 3, 1953 and April 23, 1953 as entries upon which to base a ground of deportation, by reason of the fact that it issued to [12] plaintiff permits to reenter on both said occasions?

(3) Is there a final administrative order of deportation outstanding?

(4) Is there reasonable, substantial and probative evidence that plaintiff was a member of an

excludable class at time of entry, to wit, an alien ineligible to citizenship?

The foregoing admissions of fact have been made by the parties in open court at the pre-trial conference; and issues of fact and law being thereupon stated and agreed to, the court makes this Order which shall govern the course of the trial unless modified to prevent manifest injustice.

Dated: February 11, 1957.

/s/ WM. M. BYRNE,
Judge of the U. S. District Court.

The foregoing pre-trial order is hereby approved:

GORDON, KIDDER & PRICE,

/s/ By MARSHALL E. KIDDER,
Attorneys for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant United States Attorney,
Chief of Civil Division,

ARLINE MARTIN,
Assistant United States Attorney,

/s/ By ARLINE MARTIN,
Attorneys for Defendant. [13]

[Endorsed]: Filed February 11, 1957.

United States District Court, Southern District of California, Central Division

Civil No. 19880-WB

ARTHUR TUGGI BRUNNER, Plaintiff,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The above cause having come on for trial on Monday, April 8, 1957, at 2 o'clock P.M., before the Honorable William M. Byrne, Judge presiding, plaintiff appearing by his attorneys Gordon, Kidder and Price by Marshall E. Kidder, and defendant being represented by Laughlin E. Waters, United States Attorney, Richard A. Lavine and Arline Martin, Assistant United States Attorneys, and the certified copy of the Immigration and Naturalization proceedings relating to the plaintiff having been introduced in evidence as Government's Exhibit A, the matter having been argued orally and upon written memoranda, and having been submitted to the Court for its decision, and the Court being fully advised makes the following Findings of Fact, Conclusions of Law and Judgment: [14]

Findings of Fact

I.

Jurisdiction is invoked for a declaratory judgment reviewing a final deportation order of the Immigration and Naturalization Service pursuant to the provisions of Title 28 U.S.C. §2201 and Title 5 U.S.C. §1009.

II.

The plaintiff is a resident of the County of Los Angeles, State of California, within the jurisdiction of this Court.

III.

The defendant, Albert Del Guercio, is a duly appointed, qualified and acting District Director of the Immigration and Naturalization Service, Department of Justice, Los Angeles, California.

IV.

Plaintiff, Arthur Tuggi Brunner, is a native and citizen of Switzerland, who was lawfully admitted to the United States for permanent residence at New York, New York, on October 15, 1949.

V.

On or about August, 1950, plaintiff registered for military service in accordance with the provisions of the Selective Service Act of 1948.

VI.

On or about April 2, 1951, plaintiff signed SSS Form No. 130, "Application by Alien for Relief from Training and Service in the Armed Forces",

which document is Exhibit V in the Immigration and Naturalization file.

VII.

On or about December 16, 1952, plaintiff departed from the United States in possession of a reentry permit issued by the Immigration and Naturalization Service on December 8, 1952, and [15] returned to the United States at New Orleans, Louisiana, on January 3, 1953, in possession of the aforesaid reentry permit, which document is Exhibit II in the Immigration and Naturalization file.

VIII.

On or about April 1, 1953, plaintiff departed from the United States in possession of a reentry permit issued by the Immigration and Naturalization Service on March 18, 1953, and returned to the United States at Honolulu, T. H., on April 23, 1953, in possession of the aforesaid reentry permit, which document is Exhibit IV in the Immigration and Naturalization file.

IX.

On March 21, 1955, following the completion of a deportation hearing accorded plaintiff, the Special Inquiry Officer made the following order:

"Order: It is ordered that the proceedings in this case be terminated.

The Board of Immigration Appeals has directed that this case be certified to that Board and the final order will be entered in this case by the Board. You will be allowed ten days in which to

submit to this office any brief, memorandum, or request for oral argument, which you desire to be transmitted with the record in this case, for consideration by the Board."

X.

The plaintiff did not file any notice of appeal from the order of the Special Inquiry Officer dated March 21, 1955, terminating the proceedings. [16]

XI.

There is no written direction of the Board of Immigration Appeals or the Assistant Commissioner, Inspections and Examinations Division, to certify this specific case to the Board of Immigration Appeals.

XII.

On August 30, 1955, the Board of Immigration Appeals made the following order:

"Order: It is ordered that the order of the special inquiry officer dated March 21, 1955, be withdrawn.

It Is Further Ordered that an order of deportation be not entered at this time but that the alien be required to depart from the United States without expense to the Government within such period of time and under such conditions as to the officer in charge of the District deems appropriate.

It Is Further Ordered that if the alien does not depart from the United States in accordance with the foregoing, the order of deportation be reinstated and executed."

XIII.

The plaintiff did not depart voluntarily from the United States, and a warrant of deportation was issued by the District Director, Los Angeles, California, on December 22, 1955.

XIV.

Plaintiff was found deportable by the Immigration and Naturalization Service on the ground that under Section 241(a)(1) of the Nationality Act [8 U.S.C. 1251(a)(1) 1952 Ed.] at the time of his entry he was one of a class of aliens excludable under [17] Section 212(a)(22) of the Nationality Act [8 U.S.C. 1182(a)(22) 1952 Ed.] in that he was ineligible to citizenship under Section 4(a) of the Selective Service Act because he had applied for exemption from service.

Conclusions of Law

I.

The findings and order of deportation of the Immigration and Naturalization Service are supported by reasonable, substantial and probative evidence and are affirmed.

II.

There was no error of law in the conclusion of the Immigration and Naturalization Service that plaintiff was and is debarred from becoming a citizen of the United States as a result of his application on April 2, 1952, on SSS Form 130 of the Selective Service System, for relief from training and service in the Armed Forces of the United

States, and that as a result thereof at the time of plaintiff's entries into the United States on January 3, 1953, and April 23, 1953, he was within one or more of the classes of aliens excludable by law existing at the time of said entries.

III.

There was no error of law by the Immigration and Naturalization Service in predicating said deportation order on the plaintiff's entries of January 3, 1953, and April 23, 1953, for the reason that there was no estoppel created against the Immigration and Naturalization Service by reason of its issuing to plaintiff the two permits to reenter the United States.

IV.

The Board of Immigration Appeals had jurisdiction to review and withdraw the order of the special inquiry officer dated March 21, 1955, terminating the deportation proceedings before the [18] Immigration and Naturalization Service, and the decision of the Board of Immigration Appeals constitutes a final administrative order of deportation, which order should be affirmed as valid and judgment entered accordingly.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that the final order of deportation of the plaintiff herein by the Immigration and Naturalization Service is a

valid order and that the injunction and other relief prayed for by the plaintiff be and the same is hereby denied, with costs to the defendant in the sum of $20.00 as and for a docket fee pursuant to 28 U.S.C. 1923.

Dated: May 10, 1957.

/s/ WM. M. BYRNE,
United States District Judge. [19]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 10, 1957. Docketed and Entered May 13, 1957. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Arthur Tuggi Brunner, plaintiff herein, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment in the above entitled action against plaintiff and in favor of defendant which said judgment was entered in this action on May 13, 1957.

GORDON, KIDDER & PRICE,
/s/ By MARSHALL E. KIDDER,
Attorneys for Plaintiff. [21]

Acknowledgment of Service Attached. [22]

[Endorsed] Filed June 18, 1957.

[Title of District Court and Cause.]

REQUEST TO EXTEND TIME TO FILE AND DOCKET RECORD ON APPEAL AND ORDER

Request is hereby made, for the reasons set forth in the attached affidavit of the undersigned, dated July 19, 1957, that, in accordance with Rule 74(g) of the Rules of Civil Procedure for the United States District Courts, as amended, plaintiff be allowed an additional fifty days from July 28, 1957 within which to file and docket the record on appeal.

Dated: July 19, 1957.

GORDON, KIDDER & PRICE,
/s/ By MARSHALL E. KIDDER,
Attorneys for Plaintiff.

Good cause appearing therefor, It Is Ordered that the time within which the record on appeal may be filed and docketed be, and the same is, extended until September 13, 1957.

Dated: July 19, 1957.

/s/ WM. M. BYRNE,
United States District Judge. [23]

[Title of District Court and Cause.]

AFFIDAVIT OF MARSHALL E. KIDDER

State of California
County of Los Angeles—ss.

Marshall E. Kidder, being duly sworn, deposes and says:

That he is representing the plaintiff, Arthur Tuggi Brunner, and has heretofore on June 18, 1957 filed Notice of Appeal from the judgment against plaintiff and in favor of the defendant and entered on May 13, 1957;

That the appeal is to the United States Court of Appeals for the Ninth Circuit;

That because of certain Superior Court trials, hereinafter mentioned, and certain administrative hearings before the Immigration and Naturalization Service, affiant has not yet designated the record on appeal or docketed the appeal, and the time therefor [24] will expire on or about July 29, 1957;

That affiant was engaged in trial in the Superior Court, Los Angeles County, in the personal injury action of Chavez v. Hurley, No. 660,790, from July 2, 1957 through July 5, 1957, and was engaged further in the same type of action in the case of Rivas, et al. v. Lamar, Superior Court No. 663,291, which trial was undertaken on July 16, 1957 and is still in progress;

That affiant has anticipated and planned to be

on vacation for a two-week period beginning on or about July 22, 1957.

Wherefore, affiant respectfully requests the Court, in accordance with Rule 73(g) of the Rules of Civil Procedure for the United States District Courts, as amended, to extend the time for filing the record on appeal and docketing the appeal for an additional period of fifty days beyond July 29, 1957.

/s/ MARSHALL E. KIDDER.

Subscribed and sworn to before me this 19th day of July, 1957.

[Seal] L. A. GORDON,
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires May 14, 1958. [25]

Acknowledgment of Service Attached. [26]

[Endorsed]: Filed July 19, 1957.

[Title of District Court and Cause.]

STIPULATION REGARDING ORIGINAL EXHIBITS

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the original exhibits introduced at the trial of the action, may be considered in their original form by the United States Court of Appeals for the Ninth Circuit in connection with the pending appeal and need not be printed.

Dated this 29th day of August, 1957.

GORDON, KIDDER & PRICE,
/s/ By MARSHALL E. KIDDER,
Attorneys for Plaintiff.
LAUGHLIN E. WATERS,
United States Attorney,
RICHARD A. LAVINE,
Assistant United States Attorney,
Chief of Civil Division,
ARLINE MARTIN,
Assistant United States Attorney,
/s/ By ARLINE MARTIN,
Attorneys for Defendant. [27]

[Endorsed]: Filed September 6, 1957.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Arthur Tuggi Brunner, as appellant herein, designates the portions of the record, proceedings, and evidence to be contained in the record on appeal, as follows:

1. Complaint for Judicial Review of Order of Deportation.

2. Answer to Complaint for Judicial Review of Order of Deportation.

3. Plaintiff's Proposed Pre-Trial Order.

4. Findings of Fact, Conclusions of Law and Judgment.

5. Request to Extend Time to File and Docket Record on Appeal and Order.

6. Defendant's Exhibit "A".

7. Notice of Appeal.

8. Stipulation regarding consideration of [28] Exhibits in original form.

9. Designation of Contents of Record on Appeal.

Dated: August 29, 1957.

GORDON, KIDDER AND PRICE,
/s/ By MARSHALL E. KIDDER,
Attorneys for Plaintiff. [29]

Acknowledgment of Service Attached. [30]

[Endorsed]: Filed September 6, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT RELIES

Arthur Tuggi Brunner, as appellant herein, presents herewith the following statement of points upon which he intends to rely on appeal to the United States Court of Appeals for the Ninth Circuit.

The District Court erred in concluding as a matter of law that:

1. The findings and order of deportation are supported by reasonable, substantial and probative evidence.

2. There was no estoppel created against the Immigration and Naturalization Service by reason of its issuing to plaintiff two permits to reenter the United States and predicating the deportation or-

der on the plaintiff's entries of January 3, 1953 and April 23, 1953 with such permits. [31]

3. The Board of Immigration Appeals had jurisdiction to review and withdraw the order of the Special Inquiry Officer dated March 21, 1955 terminating the deportation proceedings.

4. The decision of the Board of Immigration Appeals of August 30, 1955 constitutes a final and valid administrative order of deportation.

5. The appellee is entitled to judgment and costs.

Appellant would also rely upon the following point:

The savings clause of the Immigration and Nationality Act, Section 405, preserved the appellant's immigration status which he had prior to the 1952 Act, i.e., a resident alien entitled to depart from the United States on temporary visits and return, even though he may have been ineligible for citizenship.

Dated: September 10, 1957.

GORDON, KIDDER & PRICE,
/s/ By MARSHALL E. KIDDER,
Attorneys for Appellant. [32]

Acknowledgment of Service Attached. [33]

[Endorsed]: Filed September 11, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the

United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 33, inclusive, containing the original:

Complaint

Answer

Plaintiff's Proposed Pre-Trial Order

Findings of Fact, Conclusions of Law and Judgment

Notice of Appeal

Request to extend time to file and docket Record on Appeal

Stipulation regarding original Exhibits

Designation of Contents of Record on Appeal

Statement of Points upon which Appellant Relies

B. Defendant's Exhibit "A"

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Witness my hand and the seal of said District Court, this 12th day of September, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15711. United States Court of Appeals for the Ninth Circuit. Arthur Tuggi Brunner, Appellant, vs. Albert Del Guercio, as District Director, Immigration and Naturalization Service, Los Angeles, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: September 16, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15711

ARTHUR TUGGI BRUNNER, Appellant,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California, Appellee.

ADOPTION OF DESIGNATION OF RECORD AND STATEMENT OF POINTS UPON WHICH APPELLANT RELIES

Arthur Tuggi Brunner, as appellant herein, through his counsel, hereby formally adopted and ratifies as a portion of his case herein, and in

compliance with Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, the Designation of Contents of Record on Appeal filed in the United States District Court, Los Angeles, California, on September 6, 1957, and the Statement of Points Upon Which Appellant Relies, filed in the United States District Court, Los Angeles, California, on September 11, 1957.

Dated: September 26, 1957.

GORDON, KIDDER & PRICE,
/s/ By MARSHALL E. KIDDER,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 28, 1957. Paul P. O'Brien, Clerk.

No. 15711

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR TUGGI BRUNNER,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California,

Appellee.

APPELLANT'S BRIEF.

GORDON, KIDDER & PRICE,
448 South Hill Street,
Los Angeles 13, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 15711

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR TUGGI BRUNNER,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California,

Appellee.

APPELLANT'S BRIEF.

Jurisdictional Facts.

This case is brought before the Court of Appeals from a Judgment of the United States District Court in and for the Southern District of California, Central Division, entered May 13, 1957, dismissing plaintiff's complaint for judicial review of an order of deportation.

The District Court had jurisdiction of the matter under Title 28, U. S. C. A. 2201 and Title 5, U. S. C. A. 1009, and this Court has jurisdiction to review the judgment on appeal under Section 28, U. S. C. A. 1291.

Statutes Involved.

The warrant of deportation[1] [Ex. A, p. 49] charges that appellant is deportable because, at the time of his entry at Honolulu, Territory of Hawaii, on April 23, 1953, he was within a class excludable by law, to wit, aliens who are ineligible for citizenship.

Section 241(a)(1) of the Immigration and Nationality Act (8 U. S. C. 1251(a)(1)) reads as follows:

> "Sec. 241(a). *Deportable aliens—General classes.*
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry."

Section 212(a)(22) of the Immigration and Nationality Act (8 U. S. C. 1182(a)(22)) reads as follows:

> "Sec. 212(a). *Excludable classes of aliens* * * *.
>
> (a) Except as otherwise provided in this Act the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: * * *
>
> (22) Aliens who are ineligible to citizenship * * *."

Section 101(a)(19) of the Immigration and Nationality Act (U. S. C. A. 1101(a)(19)) reads as follows:

> "(19) The term 'ineligible to citizen,' when used in reference to any individual, means, notwithstand-

---

[1]The certified file of the Immigration and Naturalization Service is before this Court in its original form, and is designated as defendant's Exhibit "A". For the sake of convenience, the pages thereof have been numbered consecutively in red ink, and those page numbers will be cited when reference is made to said Exhibit.

ing the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts."

Section 4(a) of the Selective Service Act of 1948 (62 Stat. 605; 50 U. S. C. A., App. 454(a)), at the time herein involved, read, in part, as follows:

> "Sec. 4(a). * * * Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *"

Statement of the Case.

Appellant is a native and citizen of Switzerland, born on August 15, 1925, and is an entertainer by profession. [Ex. A, pp. 68, 69.] He is now married to a citizen of the United States, but was not so married at the time of the deportation hearing in 1955.

Appellant first entered this country at New York, N. Y., on October 15, 1949, and was admitted to reside

permanently. [Ex. A, pp. 70, 93.] He has been physically present in the United States continuously since then except for two short, temporary absences in 1953, comprising of 13 days and 21 days, respectively, when he traveled to Panama and the Carribbean area and to Korea and Tokyo, Japan, as a member of a United Service Organization show troupe for the sole purpose of entertaining United States Armed Forces stationed in those localities. [Ex. A, pp. 70-72.] He received no remuneration for these performances, and was highly commended by the public and military personnel for these unselfish and patriotic gestures. [Ex. A, pp. 70, 31-36, 116.] Paradoxically, it is these re-entries into the United States, while in possession of re-entry permits issued by the Immigration and Naturalization Service, that serve as a basis for the deportation charge.

Appellant registered under the Selective Service and Training Act in 1950, and in the same year filed a Declaration of Intention to become a citizen of the United States. [Ex. A, pp. 72, 75, 81.] During 1949 and 1950, he endeavored on about four occasions to enlist in the United States Air Force. [Ex. A, p. 75.] In the early part of 1951, at a time when appellant had a very meager knowledge of the English language, a friend prepared letters for him to his Selective Service Board proclaiming a desire to be allowed to serve in the United States Air Force and a hope of being exempted from *training* inasmuch as he had just finished four years of service and training in the Swiss Army from 1944 until 1948.

[Ex. A, pp. 75, 80, 88, 113.] On or about April 2, 1951, through a misunderstanding on the part of appellant, his lack of knowledge of the English language, and the necessity of communicating by letter with his Selective Service Board by the pen and hand of his friend, appellant signed SSS Form No. 130, "Application by Alien for Relief from Training and Service in the Armed Forces," and submitted it to his Selective Service Board. [Ex. A, pp. 77-80, 88, 96.]

Prior to proceeding abroad in 1952 and again in 1953 to entertain United States Armed Forces personnel, appellant was issued re-entry permits by the Immigration and Naturalization Service. [Ex. A, pp. 92, 94.] His Selective Service Board also gave written permission for such departures. [Ex. A, pp. 74, 82, 106, 107.] But the Government gave him no warning whatsoever of the legal effect of these departures and re-entries upon his status as a lawful permanent resident of the United States, despite the fact that the file of the Immigration and Naturalization Service was clearly "flagged" denoting that appellant might be subject to exclusion as the result of having signed SSS Form No. 130. [Ex. A, pp. 78, 82-85.]

Appellant again sought a re-entry permit about July, 1954, for the same purpose of proceeding abroad to entertain Armed Forces of the United States. [Ex. A, p. 73.] The permit was refused on the ground that he was no longer a lawful permanent resident of the United States, and on or about January 17, 1955, a warrant

was served upon him to show cause why he should not be deported from the United States. [Ex. A, pp. 73, 91.]

A deportation hearing was accorded appellant by the Immigration and Naturalization Service at Miami, Florida, on February 25, 1955. [Ex. A, pp. 67-90.] In a written decision prepared by the Special Inquiry Officer on March 21, 1955, it was ordered that the deportation proceedings be terminated. [Ex. A, pp. 61-66.] No appeal was filed by the appellant from this favorable decision. Nevertheless, and without statutory or regulatory authority insofar as appellant's counsel can determine, the Special Inquiry Officer certified the case to the Board of Immigration Appeals for its consideration.

On August 30, 1955, the Board of Immigration Appeals directed that the order of the Special Inquiry Officer be withdrawn, and found that the plaintiff was subject to deportation on the charge stated in the warrant of arrest, *i.e.,*

> "That under Sec. 241(a)(1) of the Immigration and Nationality Act, he is subject to deportation because, at the time of his entry at Honolulu, Territory of Hawaii, on August 23, 1953, he was within one or more of the classes af aliens excludable by the law existing at the time of such entry, to wit, aliens who are ineligible to citizenship under Sec. 212(a)(22) of the said Act."

The Board did not enter an order of deportation, but, instead, directed that appellant depart voluntarily from the United States. [Ex. A, p. 59]. It ordered further that if appellant did not depart from the United States,

"the order of deportation be *reinstated* and executed." [Ex. A, p. 59.] Upon failure of appellant to depart within the time allowed, a warrant was issued by the District Director, Los Angeles, California, on December 22, 1955, directing that he be deported. [Ex. A, p. 49.]

On February 24, 1956, the Board of Immigration Appeals denied a motion requesting reconsideration. [Ex. A, pp. 7-9.]

Specifications of Error.

The District Court erred in concluding that:

1. The Board of Immigration Appeals had jurisdiction to review and withdraw the order of the Special Inquiry Officer dated March 21, 1955, terminating the deportation proceedings.

2. The decision of the Board of Immigration Appeals of August 30, 1955, constitutes a final and valid administrative order of deportation.

3. There was no estoppel created against the Immigration and Naturalization Service by reason of the issuance to appellant of re-entry permits with knowledge of positive excludability, and then predicating deportation upon the last re-entry on April 23, 1953.

4. The findings and warrant of deportation are supported by reasonable, substantial and probative evidence.

ARGUMENT.

I.

The Order of the Board of Immigration Appeals Dated August 30, 1955, Is Null and Void Because of Lack of Jurisdiction.

The deportation hearing accorded the appellant at Miami, Florida, on February 25, 1955, resulted in an order of the Special Inquiry Officer that the proceedings be terminated. No appeal was filed by appellant. Neither the Board of Immigration Appeals nor the Assistant Commissioner, Inspections and Examinations Division, certified the case to the said Board. The Special Inquiry Officer, in his written decision of March 21, 1955, said [Ex. A, p. 65]:

> "An order will therefore be entered terminating these proceedings. However, the record will be certified to the Board of Immigration Appeals for review."

It is appellant's contention that the Board of Immigration Appeals was without jurisdiction to review the order of the Special Inquiry Officer terminating the proceedings.

The Board of Immigration Appeals is an agency created by regulations of the Attorney General. It is not a statutory board. Its power and authority are those which the Attorney General has conferred upon it under authority granted him by Section 103 of the Immigration and Nationality Act (8 U. S. C. A. 1103).

Appellate jurisdiction of the Board of Immigration Appeals is defined in Section 6.1(b), Title 8, Code of Federal Regulations, as follows:

> "(b) *Appellate Jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following: * * *
>
> (2) Decisions of special inquiry officers in deportation cases, as provided in Sec. 242.61 of this chapter; * * *"

The only other means by which the Board may acquire jurisdiction is by *certification,* as set forth in Title 8, Code of Federal Regulations, Section 6.1(c), which reads as follows:

> "(c) *Jurisdiction by Certification.* The Assistant Commissioner, Inspections and Examinations Division, or the Board may in any case arising under paragraph (b)(1) through (6) of this section require certification of such case to the Board."

The Court below made the following Findings of Fact [Tr. p. 17]:

> "X.
>
> The plaintiff did not file any notice of appeal from the order of the Special Inquiry Officer dated March 21, 1955, terminating the proceedings.
>
> "XI.
>
> There is no written direction of the Board of Immigration Appeals or the Assistant Commissioner, Inspections and Examinations Division, to certify this specific case to the Board of Immigration Appeals."

The regulations do not empower the Special Inquiry Officer to certify a case to the Board of Immigration

Appeals for review, and in that manner give jurisdiction to the Board. At the close of his written decision of March 21, 1955, the Special Inquiry Officer stated [Ex. A, p. 66]:

> "ORDER: It is ordered that the proceedings in this case be terminated.
>
> The Board of Immigration Appeals has directed that this case be certified to that Board and the final order will be entered in this case by the Board. You will be allowed ten days in which to submit to this office any brief, memorandum, or request for oral argument, which you desire to be transmitted with the record in this case, for consideration by the Board."

Despite the statement of the officer, the official file does not reveal that the Board of Immigration Appeals ever directed that this case be certified to it for review.

Title 8, Code of Federal Regulations, Section 242.61, reads in part as follows:

> "(c) *Order of special inquiry officer.* The order of the special inquiry officer shall be (1) that the alien be deported, or (2) that the proceedings be terminated, * * *" (Underscoring added.)

Moreover, Section 242.61(e) of Title 8, Code of Federal Regulations, provides that the order of the Special Inquiry Officer shall be final except when the case has been certified or an appeal is taken to the Board of Immigration Appeals.

The source of jurisdiction of the Board is the regulations, and hence, its jurisdiction is limited by the instrument creating it. Since no appeal was taken, and as there is a complete lack of any evidence that the case

was certified in accordance with regulations, the Board never acquired jurisdiction and the order of the Special Inquiry Officer terminating the proceedings was a final order. No citation is necessary for the universal rules that consent cannot give jurisdiction where it is not authorized by law, and that proceedings without jurisdiction are a nullity.

II.

There Is No Valid Outstanding Administrative Order of Deportation.

Assuming, *arguendo,* that the Board of Immigration Appeals had jurisdiction to review and reverse the decision of the Special Inquiry Officer, there has been a failure on the part of the administrative officers to ever precisely order the deportation of appellant. Although the District Director at Los Angeles, California, issued a warrant of deportation on December 22, 1955, the purpose of that instrument is to carry out and give effect to an order of deportation previously entered.

The Board of Immigration Appeals in its decision of August 30, 1955, specifically directed that an order of deportation be *not* entered. Its full order was as follows [Ex. A, p. 59]:

> "ORDER: It is ordered that the order of the special inquiry officer dated March 21, 1955 be withdrawn.
>
> IT IS FURTHER ORDERED that an order of deportation be not entered at this time but that the alien be required to depart from the United States without expense to the Government within such period of time and under such conditions as the officer in charge of the District deems appropriate.

> IT IS FURTHER ORDERED that if the alien does not depart from the United States in accordance with the foregoing, the order of deportation be reinstated and executed."

The Special Inquiry officer terminated proceedings and did not enter an order of deportation. The Board directed that the order of deportation be *reinstated* and executed if the alien did not depart. According to Webster's New International Dictionary, Second Edition, the word "reinstate" is defined as follows:

> "1. To instate, again; to place again (in possession, or in a former position); to reinstall, as to *reinstate* a deposed king or discharged official.
>
> 2. To restore to a fresh or proper condition or state."

Consequently, it would not be possible for the Board to *reinstate* an order of deportation that never had existence.

It is clear from the regulations that an "order of deportation" and a "warrant of deportation" are distinct entities. Section 243.1, Title 8, Code of Federal Regulations, reads as follows:

> "Sec. 243.1. *Issuance of warrants of deportation; country to which alien shall be deported; cost of detention; care and attention of alien*—(a) *Issuance.* In any case in which an order of deportation becomes final a warrant of deportation shall be issued. District directors shall issue warrants of deportation."

The Immigration and Nationality Act (8 U. S. C. 1252, *et seq.*), relating to the deportation process, makes reference only to an "order of deportation," for example:

> "8 U. S. C. 1252(b)—In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other

law or treaty, the decision of the Attorney General shall be final." (Underscoring added.)

"8 U. S. C. 1252(c)—When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months * * *" (Underscoring added.)

"8 U. S. C. 1252(d)—Any alien against whom a final order of deportation as defined in Subsection (c) heretofore or hereafter issued has been outstanding for more than six months * * *" (Underscoring added.)

While counsel concedes that the Board undoubtedly intended to order deportation upon failure to depart, it did not technically do so. The gravity and state of the proceedings give cause to appellant and counsel to claim the benefit of the omission.

III.

The Government Should Be Estopped From Predicating Deportation Upon Re-entries Made With Permits Given to Appellant With Knowledge of Future Excludability and Deportability.

In his decision of March 21, 1955, the Special Inquiry Officer recited in detail the reasons why he terminated the deportation proceedings on the basis of the doctrine of estoppel. He relates that the appellant's Immigration and Naturalization file had a cover sheet on top stating that he had made an application for relief from training and service in the Armed Forces. Further, that although the Immigration and Naturalization Service is not obligated by statute to inform an alien that he would not be readmissible to the United States even though a

re-entry permit had been issued, "it is the practice of the Service to so inform the alien." [Ex. A, p. 64.] The Special Inquiry Officer also said [Ex. A, pp. 64-65]:

> "* * * this officer is of the firm opinion that the doctrine of estoppel by silence may be applied in the error of this Service in granting two reentry permits to the respondent when the file clearly showed on both occasions subsequent to the enactment of the Immigration and Nationality Act that the respondent was excludable from admission to the United States when he presented the reentry permit which was to be issued."

The high purpose of the appellant in these journeys abroad warrants some consideration. His only object was to entertain United States troops. For this unselfish effort, he received written certificates of esteem and commendation from the Department of Defense, military officers of this Government, and was given public approbation, with other U. S. O. volunteer entertainers, in remarks of Hon. Joseph L. Holt of California, House of Representatives, Congressional Record of Thursday, July 9, 1953, pages A4431-A4432. [Ex. A, pp. 31-36, 116.]

Notwithstanding the practice of the Service to inform an alien of possible future excludability or deportability when issuing a re-entry permit, and despite the fact that the administrative file in appellant's case was clearly marked to show that he had signed SSS Form No. 130, and further, that the Immigration authorities were well aware of the exemplary purpose of the trips, the re-entry permits were delivered to appellant without any warning that their use would subject him to exclusion and deportation in the future. The action was akin to entrap-

ment, for the Government by its conduct certainly misled appellant into a false sense of security, all to his prejudice.

Counsel is cognizant of the familiar dictum that there can be no estoppel against the Government or its agency. However, acts or omissions of agents lawfully authorized to bind the United States or direct its course of conduct during a particular transaction may estop the Government. (See *United States v. Certain Parcels of Land,* 131 Fed. Supp. 65 (S. D. Cal., May 3, 1955), and cases cited therein.)

While the Government may proclaim that it was acting within the scope of the law and regulations in issuing and delivering the re-entry permits, it is clear that it undertook such action with notice that appellant would be subject to exclusion and deportation upon return. Since estoppel stands for the basic precepts of common honesty, clean fairness and good conscience, it is urged that the conclusion of the Special Inquiry Officer that the doctrine applies here should be upheld. Even the Board concluded that the issuance of the re-entry permits and the admission of the respondent were *obviously erroneous.* [Ex. A, p. 59.]

IV.

There Is No Reasonable, Substantial and Probative Evidence That Appellant Knowingly and Intentionally Waived His Rights to Citizenship.

Prior to entry into the United States for permanent residence, appellant had served four years in the Swiss Army from 1944 until 1948. He considered training and service as two separate things, and believed that he had been well trained. Appellant attempted to enlist in the United States Air Force on at least four occasions. At

the time SSS Form No. 130 was sent to him by his Selective Service Board in early 1951, he had a limited knowledge of the English language, and had to depend upon others to prepare his correspondence and to explain matters to him. Appellant testifies that his only purpose in signing the SSS Form No. 130 was to "get around training." [Ex. A, p. 88.] He adds that:

> "I never, never the least bit tried to duck the Armed Forces, wear the Army uniform or fight for the Armed Forces here. I never had this intention to get out of it." [Ex. A, p. 87.]

In *Moser v. United States,* 341 U. S. 41, 71 S. Ct. 553, it was made abundantly clear that an alien who executed the Selective Service Form entitled "Application by Alien for Relief from Training and Service in the Armed Forces" did not become ineligible for citizenship if he did not knowingly and intentionally intend to waive such rights when he signed the form. *Moser* had been advised by the Swiss Legation to sign the form and had been lulled into a misconception of the legal consequences of applying for exemption. The Court granted him United States citizenship. (To the same effect is the matter of the *Petition of Berini,* 112 Fed. Supp. 837 (U. S. D. C., E. D. N. Y., June 15, 1953).) *Berini,* like appellant, was also a Swiss national, who, when he signed the Selective Service Form, was of the opinion that he would not be debarred from citizenship.

In his decision of March 21, 1955, the Special Inquiry Officer said with respect to appellant [Ex. A, p. 63]:

> "It is very apparent from the review of this record as a whole that the respondent did not desire in 1951 to evade service in the Armed Forces, but only training, and that it was a misunderstanding by the

respondent, and by the Selective Service Board in not properly informing the respondent in view of the aforesaid letter from him (Exhibit 7) as to his reason for signing the form."

Appellant's correspondence with his Selective Service Board was prepared by a friend because of his inadequate knowledge of the English language. Appellant asserts that he did not understand the import of SSS Form No. 130 when he signed it, and did not realize that he would forfeit the opportunity to become a citizen. Like the case of *Moser,* the appellant, because of unfortunate circumstances, never had an opportunity to make an election between the diametrically opposed courses, namely, military service with citizenship, or exemption without citizenship. The Supreme Court said in *Moser v. United States, supra* (p. 47): "* * * nothing less than an intelligent waiver is required by elementary fairness."

Wherefore, appellant prays that the judgment of the lower court be reversed, and that he be found to be not deportable from the United States.

Respectfully submitted,

GORDON, KIDDER & PRICE,

By MARSHALL E. KIDDER,

Attorneys for Appellant.

No. 15711
IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR TUGGI BRUNNER,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

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Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The District Court had jurisdiction of the action for review of a final order of deportation pursuant to Title 28, United States Code, Section 2201, and Title 5, United States Code, Section 1009, as alleged in the complaint [R. 3].

This Court has jurisdiction to review the judgment of the District Court [R. 14-20], that the deportation order is a "valid order," pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294(1), the judgment of the District Court being a final order.

Statutes and Regulations Involved.

Section 241(a)(1) of the Immigration and Nationality Act (8 U. S. C. 1251(a)(1) (1952 Ed.)) reads as follows:

"Sec. 1251. *Deportable Aliens—General classes.*

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry."

Section 212(a)(22) of the same Act (8 U. S. C. 1182(a)(22) (1952 Ed.)) reads as follows:

"Sec. 1182. *Excludable classes of aliens.* * * *

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: * * *

(d)(7) The provisions of subsection (a) of this section, except paragraphs (2), (21) and (26) of said subsection, shall be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. * * *"

Section 101 (a)(13) of the same Act (8 U. S. C. 1101(a)(13) (1952 Ed.)) reads as follows:

"Sec. 1101. *Definitions.*

(a) As used in this chapter—

(13) the term 'entry' means any coming of an alien into the United States, from a foreign port or place or from any outlying possession, whether voluntary or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purpose of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying

possession was not voluntary: *Provided,* That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

Section 315(a) of the Immigration and Nationality Act (8 U. S. C. 1426(a)(b) (1952 Ed.)) reads as follows:

"Sec. 1426. *Citizenship denied alien relieved of service in armed forces because of alienage; conclusiveness of records.*

(a) Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien. June 27, 1952, c. 477, Title III, ch. 2, §315, 66 Stat. 242."

Title 8, United States Code, Section 210(b) and (f) (1942 Ed.), reads as follows:

"Sec. 210. *Reentry permits.*

* * * * * * * *

(b) *Issue by Commissioner with approval of Attorney General; life of permit; form and contents of permit; photograph attached.* If the Commissioner of Immigration and Naturalization finds that the alien has been legally admitted to the United States,

and that the application is made in good faith, he shall, with the approval of the Attorney General, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with such other matters as may be deemed necessary for the complete identification of the alien.

* * * * * * * *

(f) *Effect of permit on rights of alien.* A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning."

Section 101(a)(19) of the Immigration and Nationality Act (8 U. S. C. A. 1101(a)(19)) reads as follows:

"(19) The term 'eligible to citizenship,' when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law mandatory of, supplementary to, or in substitution for, any of such sections or Acts."

Section 4(a) of the Selective Service Act of 1948 (62 Stat. 605; 50 U. S. C. A. App. 454(a)), at the time herein involved reads, in part, as follows:

> "Sec. 4(a). * * * Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *"

Section 6.1(b)(2) and (c) of the Immigration and Naturalization Regulations (8 C. F. R. 6.1(b), (c), revised 1952), relating to the Board of Immigration Appeals, provides:

> "(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following: * * *
>
> (2) Decisions of special inquiry officers in deportation cases, as provided in Sec. 242.61 of this chapter; * * *
>
> (c) *Jurisdiction by certification.* The Assistant Commissioner, Inspections and Examinations Division, or the Board may in any case arising under paragraph (b)(1) through (6) of this section require certification of such case to the Board."

The regulations which were applicable at the time of this case were those enacted in December of 1952, which were effective until new regulations came out in 1956.

Sections 242.61(c) and (3) of the Code of Federal Regulations, Title 8 (revised 1952 Ed.), provides as follows:

> "(c) *Order of special inquiry officer.* The order of the special inquiry officer shall be (1) that the alien be deported, or (2) *that the proceedings be terminated,* * * *. (Emphasis added.)
>
> (e) *Finality of order.* The order of the Special Inquiry Officer shall be final except when:
>
> (1) the case has been certified as provided in Section 7.1(b) or 6.1(c); or
>
> (2) an appeal is taken to the Board of Immigration Appeals."

Statement of the Case.

A certified copy of the Immigration File on which the final order of deportation is based, was offered in evidence as Exhibit A, for review by the court, and is before this Court in its original form, pursuant to stipulation of the parties.

This is a case in which the appellant, an alien, first entered the United States for permanent residence at New York in October of 1949, and on or about April 2, 1951, executed Selective Service Form No. 130, which is the Alien's Application for Relief from Training and Service in the Armed Forces, and which application bears with it, as will be seen from the provisions quoted below, the loss of eligibility to become a citizen.

SSS Form No. 130 is contained in the Immigration File [Ex. A in evid.] as Exhibit 5 attached to the original hearing and contains the following quotation above the signature:

> "I hereby apply for relief from liability for training and service in the armed forces of the United

States, I have read the NOTICE given below, and I understand that I will forever lose my right to become a citizen of the United States, and I may also be prohibited from entry into the United States or its territories or possession as a result of filing this application."

The NOTICE referred to in the above quotation is contained at the bottom of the SSS Form No. 130 and reads as follows:

"NOTICE.

Section 4(a) of the Selective Service Act of 1948 provides in part that 'Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction in the armed forces, he had made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application *shall thereafter be debarred from becoming a citizen of the United States.*' (Emphasis added.) Under other existing law, an alien who is not a permanent lawful resident of the United States at the time of execution of this application, thereafter becomes barred from ever making an entry for permanent residence into the United States, including Alaska, Hawaii, Puerto Rico, and the Virgin Islands, unless he enters as a minister of any religious denomination or as a professor of a college, academy, seminary, or university."

Appellant subsequently re-entered the United States at Honolulu on a re-entry permit and as of April 23, 1953, and on March 12, 1954, arrived in the United States at Seattle, Washington. In January of 1955 a warrant

of arrest was served on appellant at Miami, Florida, charging that he was deportable under Section 241(a)(1) of the Nationality Act (8 U. S. C. 1251(a)(1) (1952 Ed.)) (*supra*) in that at the time of entry he was one of a class of aliens excludable under Section 211(a)(22) (8 U. S. C. 1182(a)(22) (1952 Ed.)) (*supra*) in that he was ineligible to citizenship under Section 4(a) of the Selective Service Act because he had applied for exemption from service.

A hearing was held before a Special Inquiry Officer and the Special Inquiry Officer determined that the plaintiff was erroneously granted re-entry permits by the Immigration Service on December 8, 1952 and on March 18, 1953, after he had become ineligible to citizenship and that therefore he was not deportable and ordered that the proceedings in the case be "terminated" and that "the Board of Immigration Appeals has directed that this case be certified to that Board and the final order will be entered in this case by the Board. * * *"

The Board of Immigration Appeals, on August 30, 1955, ordered the Special Inquiry Officer's order withdrawn and determined that there was no estoppel as a matter of law by reason of the issuance of the two prior re-entry permits after the plaintiff became ineligible for citizenship, and that the plaintiff was deportable and, after considering a motion to reconsider, denied said motion and entered its final determination on February 26, 1956.

Summary of Argument.

I.

APPELLANT WAS GIVEN NOTICE THAT THE CASE WAS CERTIFIED TO THE BOARD OF IMMIGRATION APPEALS AND THAT HE HAD TEN DAYS TO FILE ANY WRITTEN MATTER OR REQUEST FOR ORAL ARGUMENT; THE FACT THERE IS NO WRITTEN DIRECTION FROM THE BOARD OF IMMIGRATION APPEALS THAT THE RECORD BE CERTIFIED IS IMMATERIAL.

II.

THE BOARD'S ORDER THAT THE "ORDER OF DEPORTATION BE REINSTATED" IF THE ALIEN DID NOT TAKE ADVANTAGE OF ITS GRANT OF VOLUNTARY DEPARTURE IS A SUFFICIENT ENTRY OF AN ORDER OF DEPORTATION; SUBSEQUENT MOTIONS BY APPELLANT THAT THE BOARD RECONSIDER ITS ORDER OF DEPORTATION WERE SO PREDICATED.

III.

ISSUANCE OF A RE-ENTRY PERMIT IS NO GUARANTY OF NONDEPORTABILITY AND DOES NOT ESTOP THE GOVERNMENT FROM EXCLUDING OR DEPORTING FOR CAUSE.

IV.

THERE IS REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE THAT APPELLANT MADE AN INTELLIGENT WAIVER OF HIS RIGHT TO CITIZENSHIP WHEN HE SIGNED SELECTIVE SERVICE FORM 130.

I.

Appellant Was Given Notice That the Case Was Certified to the Board of Immigration Appeals and That He Had Ten Days to File Any Written Matter or Request for Oral Argument; the Fact There Is No Written Direction From the Board of Immigration Appeals That the Record Be Certified Is Immaterial.

The Board of Immigration Appeals had jurisdiction to withdraw the order of the Special Inquiry Officer and to determine that appellant was deportable. The applicable regulations are Section 6.1(b)(2) and (c) and Section 242.61(c) and (e), *supra.*

The order of the Special Inquiry Officer [Ex. A in evid. p. 66] reads as follows:

> "ORDER: It is ordered that the proceedings in this case be terminated.
>
> The Board of Immigration Appeals has directed that this case be certified to that Board and the final order will be entered in this case by the Board. You will be allowed ten days in which to submit to this office any brief, memorandum, or request for oral argument, which you desire to be transmitted with the record in this case, for consideration by the Board."

The order of the Board of Immigration Appeals [Ex. A in evid. p. 59] reads as follows:

> "ORDER: It is ordered that the order of the special inquiry officer dated March 21, 1955 be withdrawn.
>
> It Is Further Ordered that an order of deportation be not entered at this time but that the alien be required to depart from the United States with-

out expense to the Government within such period of time and under such conditions as the officer in charge of the District deems appropriate.

It Is Further Ordered that if the alien does not depart from the United States in accordance with the foregoing, the order of deportation be reinstated and executed."

The regulations, summarized *supra,* provide that the Board of Immigration Appeals may require certification of any decisions of special inquiry officers to the Board and that an order of the special inquiry officer shall be final except when the case has been certified to the Board.

The real question here is whether or not the Board required certification of this case to the Board of Immigration Appeals. It is conceded that the only evidence that such is the case is contained in the order of the special inquiry officer to the effect that "the Board of Immigration Appeals has directed that this case be certified to the Board and the final order will be entered in this case by the Board. * * *" It is upon this state of facts that the District Court found that the Board of Immigration Appeals had jurisdiction to review and withdraw the order of the special inquiry officer. It seems a valid inference from the order of the special inquiry officer that the Board of Immigration Appeals desired the case to be certified, and further from the fact that the Board of Immigration Appeals did review the case, and withdrew the order of the special inquiry officer, it is clear they did desire to review the matter, and there appears to be sufficient evidence from which to infer that the Board did require that the case be certified to it.

It is not essential that there be in the file a written request from the Board for certification. This was, of

course, the view of the District Court, whose finding was that there was "no written direction of the Board" [R. 17, 19]. It cannot be said that there is a lack of any evidence that the case was certified in accordance with regulations.

II.

The Board's Order That the "Order of Deportation Be Reinstated" if the Alien Did Not Take Advantage of Its Grant of Voluntary Departure Is a Sufficient Entry of an Order of Deportation; Subsequent Motions by Appellant That the Board Reconsider Its Order of Deportation Were so Predicated.

The formal order of the Board of Immigration Appeals, dated August 30, 1955 [Ex. A in evid. p. 59], reads as follows:

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> It Is Further Ordered that if the alien does not depart from the United States in accordance with the foregoing, the order of deportation be reinstated and executed."

Subsequently, on January 9, 1956 [Ex. A, p. 19], the Board stayed its deportation of plaintiff pending further consideration and made its order that oral argument on

the motion be granted. On February 24, 1956 [Ex. A, p. 7], the Board said:

> "The matter comes before us on motion of counsel requesting reconsideration of our order of August 30, 1955, in which we found the respondent subject to deportation on the ground stated above and granted the respondent the privilege of voluntary departure in lieu of deportation."

The Board concluded to deny the motion for reconsideration.

It is clear that if the appellant had taken advantage of the Board's grant of voluntary departure, that there would have been no order of deportation outstanding against the appellant. But it is equally clear that since the appellant declined to voluntarily depart that the provision of the Board's order for "reinstatement" came into operation and the order of deportation became effective. The subsequent proceedings, including the motion for reconsideration and its denial, and the several notices to appellant, requesting his appearance for deportation pursuant to the order, leave little doubt about this fact.

III.

Issuance of a Re-entry Permit Is No Guaranty of Nondeportability and Does Not Estop the Government From Excluding or Deporting for Cause.

It is now Hornbook law that the "entry" upon which a deportation is based can be "any entry," prior or subsequent to the Act or basis upon which the deportation is predicated. Likewise, the statute makes it clear that the issuance of a permit to re-enter "shall have no effect under the Immigration laws, except to show that the alien to whom it issued is returning from a temporary visit abroad." (8 U. S. C., Sec. 210(s).)

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It is now Hornbook law that the "entry" upon which a deportation is based can be "any entry," prior or subsequent to the Act or basis upon which the deportation is predicated. Likewise, the statute makes it clear that the issuance of a permit to re-enter "shall have no effect under the Immigration laws, except to show that the alien to whom it issued is returning from a temporary visit abroad." (8 U. S. C., Sec. 210(s).)

The Government has no duty to warn aliens of the possible effect of an exit and re-entry and therefore cannot be estopped by reason of a failure to so warn even if estoppel were available as to the Government, which appellant concedes it is not (App. Br. 15). Not only is this sound law, it is apparent that if the rule were otherwise it would put an impossible administrative burden on the Immigration Service and would for all practical purposes nullify the grounds of deportation which are based upon a condition of "entry." As the court said in *Savoretti v. Violer,* 214 F. 2d 425 (C. A. 5, 1954), "the word 'entry' has acquired a special meaning in judicial interpretation of immigration statutes." It has become a word of art. This was the court's conclusion even prior to the enactment of the 1952 definition of the word "entry" (*supra*).

Nor can the Immigration Service be bound by the unauthorized acts of its agents in issuing a re-entry permit, if it was "error" to issue such a permit. It must be remembered that the re-entry permit does not guarantee the right of re-entry, it is a document which, like a visa, is limited, by statute, in its scope (*Zacharias v. McGrath,* 105 Fed. Supp. 421).

The re-entry permits here involved are contained in the Immigration File as Exhibits II and IV attached to the hearing of February 25, 1955, and provide on their face that

> "Pursuant to provisions of Section 223 of the Immigration and Nationality Act, this permit is issued to bearer * * * an alien previously lawfully admitted to the United States, to re-enter the United States, *if otherwise admissible.* * * *" (Emphasis added.)

IV.

There Is Reasonable, Substantial and Probative Evidence That Appellant Made an Intelligent Waiver of His Right to Citizenship When he Signed Selective Service Form 130.

There is no question but that on or about April 2, 1951, appellant signed SSS Form No. 130 [Ex. A in evid.; Ex. V], "Application by Alien for Relief from Training and Service in the Armed Forces," which contains the material indicated under our Statement of the Case, to the effect that such applicant would

> "forever lose my right to become a citizen of the U. S., and I may also be prohibited from entry into the United States or its territories or possessions as a result of filing this application."

Appellant now makes the argument that he did not sign that form with an intelligent understanding of the rights he was waiving. Yet, on March 7, 1951, and prior to the signing of that form, he wrote a letter to Local Board No. 5 [Ex. A in evid. p. 113] which stated in part,

> "After careful consideration I find I do not like to lose my chances of becoming a citizen. The main reason for my not desiring draft into the Army is because I do so much wish to go into the Air Force. * * *"

When asked, during the hearing, by the Special Inquiry Officer, "Well, Mr. Brunner, if you tried to enlist in the Air Force why did you file this Application (referring to SSS Form 130)?" the appellant answered, "I didn't think this application refers to me at all. All I thought it was getting out of training. I didn't have anything against serving in the Armed Forces."

The lower court apparently thought this was a rather weak explanation in light of the above letter, and affirmed the decision of the Board of Immigration Appeals.

Conclusion.

It is respectfully submitted that the decision of the District Court, affirming the decision of the Board of Immigration Appeals that appellant is deportable, be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

ARLINE MARTIN,
Assistant U. S. Attorney,

Attorneys for Appellee.

No. 15715

United States
Court of Appeals
for the Ninth Circuit

VAUGHN CECIL COWELL, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—2-6-58

No. 15715

United States
Court of Appeals
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VAUGHN CECIL COWELL, Appellant,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

RICHARD D. HARRIS,

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U. S. Attorney,

MURRAY B. GUTERSON,

Asst. U. S. Attorney,
1012 U. S. Court House,
Seattle 4, Washington,

Attorneys for Appellee.

United States District Court, Western District of Washington, Northern Division

No. 49682

UNITED STATES OF AMERICA, Plaintiff,

vs.

VAUGHN CECIL COWELL, Defendant.

INFORMATION

The United States Attorney charges:

Count I.

That on or about February 13, 1957, at Seattle, Washington, within the Northern Division of the Western District of Washington, Vaughn Cecil Cowell did knowingly and unlawfully steal from a wharf, to wit, Pier 50, with intent to convert to his own use, goods moving as and which were a part of and which constituted an interstate shipment of freight and express, to wit, a quantity of vodka being shipped from Hartford, Connecticut, to Seattle, Washington, of a value not in excess of $100.

All in violation of Section 659, Title 18, U.S.C.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ MURRAY B. GUTERSON,
Assistant United States Attorney.

[Endorsed]: Filed April 26, 1957.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the defendant Vaughn Cecil Cowell guilty as charged in Count I of the Information.

/s/ JOHN D. GRIGGS,
Foreman.

[Endorsed]: Filed July 9, 1957.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant moves the Court to grant him a new trial for the following reasons:

* * * * *

6. The Court erred in charging the jury and in refusing to charge the jury as requested.

* * * * *

7. c. Court's comments on the evidence of the jury during its instructions.

* * * * *

/s/ RICHARD D. HARRIS,
Attorney for Defendant.

[Endorsed]: Filed July 11, 1957.

United States District Court, Western District of Washington, Northern Division

No. 49682

UNITED STATES OF AMERICA, Plaintiff,

vs.

VAUGHN CECIL COWELL, Defendant.

JUDGMENT AND COMMITMENT

On this 12th day of August, 1957 came the attorney for the government and the defendant appeared in person and with Richard D. Harris, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a jury verdict of guilty, of the offense of violation of Section 659, Title 18, U.S.C. as charged in Count I of the Information, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as to Count I and as to said Count I is convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of Six (6)

Months in such institution as the Attorney General of the United States or his authorized representative may by law designate on Count I of the Information.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done in Open Court this 12th day of August, 1957.

/s/ GUS J. SOLOMON,
United States District Judge.

Presented by:

/s/ MURRAY B. GUTERSON,
Assistant United States Attorney.

[Endorsed]: Filed August 12, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The Appellant: Vaughn Cecil Cowell, 8615 12th SW, Seattle, Washington.

Appellant's Attorney: Richard D. Harris, 428 Henry Building, Seattle, Washington.

Offense: Violation of Section 659, Title 18, U.S.C.

The above named appellant, feeling aggrieved by the verdict, judgment, sentence, and denial of motion for new trial, hereby appeals from the same to

the United States Court of Appeals for the Ninth Circuit.

Dated this 15th day of August, 1957.
/s/ RICHARD D. HARRIS,
Attorney for Defendant.
Acknowledgment of Service Attached.
[Endorsed]: Filed August 15, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 39(b)(1) FRCrP, I am transmitting herewith the following original papers in the file dealing with the action as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1.A. Commissioner's Transcript, with warrant and bond attached, filed 4-3-57.

1. Information, filed 4-26-57.

2. Praecipe, government for 7 subpoenas in blank, filed 6-27-57.

3. Praecipe, deft. for subpoenas in blank, filed 7-6-57.

4. Plaintiff's Requested Instructions, filed 7-9-57.

5. Verdict, filed 7-9-57.

6. Marshal's returns on subpoenas, Linden, et al., filed 7-11-57.

7. Motion for New Trial filed July 11, 1957.

8. Marshal's return on subpoena, Bates, filed 7-19-57.

9. Judgment, Sentence and Commitment, filed 8-12-57.

10. Notice of Appeal, filed 8-15-57.

11. Bond on appeal, $500.00, Michigan Surety Company, filed 8-15-57.

Plaintiff's Exhibits Nos. 3 and 4. (Plaintiff's Exhibits 1 and 2, liquor exhibits, not sent up.)

Witness My Hand and Official Seal at Seattle this 13th day of September, 1957.

[Seal] MILLARD P. THOMAS,
Clerk,
/s/ By TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Seattle, Washington, Tuesday, July 9, 1957, 10:00 a.m.

Before: Honorable Gus J. Solomon, District Judge, with a jury.

Appearances: Mr. Murray B. Guterson, Assistant United States Attorney, appearing in behalf of United States of America; Mr. Richard D. Harris, Attorney for Defendant.

Court Reporter: Mr. Gordon R. Griffiths. [1]*

* * * * *

The Court: All witnesses are now excused from further attendance at the trial.

Mr. Harris: The last point is that there has been no testimony before this court or jury that Pier 50 is within the Northern Division of the Western District of Washington.

The Court: The motion is denied on all grounds. Do you have any additional requests other than that of an instruction on the accomplice?

Mr. Harris: No, I do not, your Honor. I would like to cite one case to your Honor in regard to the accomplice instruction.

The Court: What is it?

Mr. Harris: That is 217 U.S., page 509, page 523.

The Court: What does it say?

Mr. Harris: "It is further alleged that the court erred in refusing to give the following request."

The Court: What state did it come up from?

Mr. Harris: Well, it came out of the Eighth Circuit, as I recall.

The Court: Do you have a special rule in the State of Washington to the effect that the testimony of an accomplice must be corroborated?

Mr. Harris: No, I don't believe we do.

The Court: What does the case hold to that effect? [146] What is the purpose of citing the case?

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* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

Mr. Harris: That it does indicate here that there should be an instruction — it is undoubtedly better practice for the Court to caution juries in reliance upon testimony of accomplices and to require corroborating testimony before giving credence to them.

The Court: I am not going to give that. I am going to instruct the jury that the testimony of the accomplice must be viewed with caution and weighed with great care, but that the testimony of an accomplice, if believed, is sufficient to establish any fact in the case.

(Thereupon, counsel for the respective parties made their arguments to the jury.) [147]

The Court: Ladies and gentlemen of the jury: The defendant was indicted under a law which provides in substance: whoever steals or unlawfully takes or carries away from any railroad car, motor truck or other vehicle, or from any station or depot or from any steamboat, vessel or wharf, with intent to convert to his own use, any goods or chattels moving as, or which are a part of or which constitute an interstate or foreign shipment of freight or express shall be guilty of a crime.

An Information was returned against the defendant under this law. It is very short, and I shall read it to you. It contains only one count. The United States Attorney charges, "That on or about February 13, 1957, at Seattle, Washington, within the Northern Division of the Western District of Washington, Vaughn Cecil Cowell did knowingly and unlawfully steal from a wharf, to wit, Pier 50,

with intent to convert to his own use, goods moving as and which were a part of and which constituted an interstate shipment of freight and express, to wit, a quantity of vodka being shipped from Hartford, Connecticut, to Seattle, Washington, of a value not in excess of $100.

"All in violation of Section 659, Title 18, United States Code."

To this Information the defendant entered a plea of not guilty. This plea of not guilty puts in issue each [148] and every material allegation of the Information. Although the Information is positive in its language, it is merely a formal charge of crime made by the United States Attorney. It is not evidence of any kind against the accused and does not create any presumption or inference of guilt. On the contrary, the law presumes the defendant to be innocent of any crime. This presumption of innocence continues throughout the trial and up until such time, if that time ever arrives, where the defendant is convicted to your satisfaction and beyond a reasonable doubt. The presumption of innocence has the weight and effect of evidence in favor of the accused. You must consider the evidence in the light of this presumption. The government must prove every essential element of the crime charged beyond a reasonable doubt. A defendant has the right to rely upon the failure of the government to establish such proof. In other words, a reasonable doubt may arise not only from the evidence produced but also from the lack of evidence. A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution.

A reasonable doubt is such a doubt that may exist in the mind of the ordinary, reasonable and prudent person after a full, fair and complete examination of all the facts and circumstances surrounding the crime charged. It must not be a mere possible doubt which is inconsistent [149] with evidence which the jury credits and believes, but it must be such a doubt as, in the graver and more important affairs of life, would cause the ordinary, reasonable and prudent person to pause and hesitate before acting upon the truth of the matter charged.

Absolute demonstration is not required; that is, proof to a mathematical certainty because such proof is rarely available. Moral certainty alone is required, or that degree of proof which produces conviction in the unprejudiced mind.

The material allegations of this Indictment are: First, that there must be a crime committed as charged in the Information; that is, there must have been a stealing of goods sent in interstate commerce. Second, that the defendant is the person, or one of the persons, who committed the crime, and, lastly, that the crime, if any, was committed in the Western District of Washington, Northern Division, and this includes Seattle, Washington. You have to find that this theft took place on a pier in the City of Seattle because that is the only place that was charged.

I want to point this out as a matter of comment, that the defendant is the only one here on trial. Neither the United States Attorney nor his deputy

nor the Federal Bureau of Investigation is on trial, and you need not determine whether the FBI agents who appeared here did a [150] good job or could have done a better job or did a better job. That is wholly extraneous to any issue in this case because you have no power to hire or discharge or promote any of these FBI agents or any other police officer. You have one duty and one duty alone, and that is to determine whether the defendant was guilty of a crime.

There was evidence concerning Mr. Linden's activities, and I will tell you about that also later as to the weight you can give his statement, but now I merely state that whether Mr. Linden is likewise guilty of a crime or Mr. Abel was guilty of some offense is not involved in this case, only to the extent of the credibility of those witnesses. I want to direct your attention once again to the fact that if you find beyond a reasonable doubt and to a moral certainty that the defendant is guilty of this crime, you should bring in a verdict of conviction regardless of whether other people might also be guilty of a crime and regardless of whether the Federal Bureau of Investigation people or other people might have done a bad or a good job.

In order the find the defendant guilty, the United States must prove certain elements.

First: That on or about February 13, 1957, at Seattle, Washington, the defendant stole from a wharf a quantity of vodka or one bottle of vodka.

Second: That this vodka was moving as and was a [151] part of an interstate shipment of freight and express.

Third: That the defendant took this vodka knowingly and unlawfully.

And, lastly: That the defendant took this vodka with the intent to convert it to his own use.

In order to find the defendant guilty, it is not necessary to find that he removed the goods in question to a place away from the wharf. It is only necessary to find that the defendant moved the goods some distance, however slight, from their proper place with intent to convert them to his own use.

Likewise, it is not necessary that the government prove that the defendant knew that the goods in question or the bottle of vodka was a part of an interstate shipment. It is only necessary that you find that it was in fact part of an interstate shipment.

In determining whether this vodka was a part of an interstate shipment during the night and morning of February 13, 1957, it is the law that a shipment does not lose its interstate character until it has been delivered to the consignee at its destination or until the carrier has surrendered control of said shipment to the consignee.

I have used certain words which I now desire to define for you. The word "convert" means to assume and exercise ownership over the goods and chattels of another [152] without authority so it is not necessary that the government prove that this defendant actually consumed this liquor for himself, but if he exercised control, dominion and ownership over the vodka by presenting it to someone,

then under the law he would have converted it to his own use. "Unlawfully" means contrary to law. Hence, to do and act unlawfully means to do something intentionally which is contrary to law. The word "knowingly" was added to insure that no one would be convicted because of mistake, inadvertence or other innocent reason.

In this connection I want to instruct you that there was some evidence that this defendant was drinking. I instruct you that voluntary intoxication is no defense to crime. However, I instruct you that if you find that at the time of the alleged theft, the defendant was so intoxicated that he was temporarily deprived of his reason and that he was incapable of having any intent to commit the act, then your verdict must be in favor of the defendant. Generally speaking, there can be no crime without a criminal intent, and you must find criminal intent in order to convict the defendant.

A person who knowingly does an act which the law forbids, purposely intending to violate the law, acts with specific intent. Intent may be proved by circumstantial evidence. It rarely can be established by any other means. [153] While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the act is done, but what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged for experience has taught us that actions often speak more clearly than written or spoken words. The jury should consider

all the facts and circumstances in evidence which may aid in the determination of the issue as to intent.

Any fact in this case may be proved by either direct or circumstantial evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which in itself, if true, conclusively establishes the fact. The direct evidence of the commission of a crime consists of testimony of every witness who with his own physical senses perceived any of the conduct constituting the crime charged and which testimony relates to what was thus perceived.

Other evidence admitted in the trial is circumstantial evidence. Circumstantial evidence is evidence of acts, declarations, conditions or other circumstances tending to prove a crime in question or tending to connect a defendant with the commission of such crime. In other words, it is proof of a chain of circumstances pointing to [154] the commission of crime. Circumstantial evidence sometimes may be stronger on account of inferences that may be drawn from it than the testimony of eyewitnesses. No greater degree of certainty is required when the evidence is circumstantial than when it is direct. The law makes no distinction between direct and circumstantial evidence but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

As you can see from the testimony, this case

bristles with issues of veracity. In instances too numerous to mention, the testimony of witnesses called by the government is flatly contradicted by the testimony of the defendant himself. It is your function, and yours alone, to determine where the truth lies. By what yardstick and in accordance with what rules of law are you to judge the credibility of witnesses, including that of the defendant? Every witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief, not only each witness' intelligence, motive, [155] state of mind and demeanor and manner while on the stand, but also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause a jury to discredit such testimony.

Two or more persons witnessing an incident or transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, particularly as to times, dates and places, is not an uncommon experience. In weighing the effect

of a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail and whether the discrepancy results from innocent error or from willful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, that you think it deserves. In other words, there is nothing peculiarly different in the way a jury is to determine the credibility of a witness from that in which all reasonable persons size up other people with whom they are dealing when making important decisions. You consider [156] whether the person with whom you are dealing had the capacity and opportunity to observe and be familiar with and remember the things he tells you about. You consider any possible interest he may have and any bias or prejudice. You consider the person's demeanor, and you decide whether he strikes you as fair and candid. In other words, you size him up. Then you consider the inherent believability of what he says and whether it accords with your own knowledge or experience. The same is true of witnesses. You ask yourself if they know what they are talking about. You watch them on the stand as they testify, and you note their demeanor, and you decide how their testimony strikes you.

Take the matter of interest, for example. You may feel that some witnesses, whether for the government or for the defense, have an interest in the outcome of the case. Where a witness has a strong personal interest in the result of the trial, the

temptation may be strong to color, pervert, or withhold the facts. Even though completely honest, a witness who has an interest in the case may unconsciously shade his testimony. On the other hand, such a witness may be telling the exact truth despite his interest in the outcome. You must consider all the attendant circumstances in deciding whether and to what extent interest has affected the witness. [157]

The greater a person's interest in the case the stronger is the temptation for false testimony, and the interest of the defendant is of a character possessed by no other witness. Manifestly, he has a vital interest in the outcome of the case. This interest is one of the matters which you must consider along with the other attendant circumstances in determining the credence you will give to his and their testimony.

What I have said concerning interest of a witness applies with equal force to the matter of bias and prejudice. Where you find that any witness has any bias or prejudice for or against any of the parties, you will consider whether and to what extent such bias and prejudice has affected his testimony. You will accordingly observe that before reaching any conclusion as to whether you will believe the testimony of any particular witness or the defendant or as to whether you will believe part of his testimony, the testimony of the witness or the defendant, and reject the rest. It is essential that you give consideration to all the circumstances bearing upon the question of credibility

of the particular witness as I have just indicated.

All evidence of a witness who is connected with the commission of the offense charged should be considered with caution and weighed with great care. One who is connected with the commission of an offense charged is [158] referred to as an accomplice. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain the verdict of guilty even though not corroborated or supported by other evidence, but I instruct you that before you may find a verdict of guilty on the unsupported evidence of an accomplice you must believe that evidence beyond a reasonable doubt and to a moral certainty. In other words, his testimony alone must establish the guilt beyond a reasonable doubt and to a moral certainty.

The direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in the case; therefore, you are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration of a lesser number of a presumption or other evidence which does appeal to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from bias or prejudice. It does mean that you are not to decide an issue by the mental process of count-

ing the number of witnesses who have testified on opposing sides. It means [159] that the final decision is not the relative number of witnesses but in the relative force of the evidence.

In order to justify a verdict based in whole or in part upon circumstantial evidence, the facts in the case or circumstances shown by the evidence must be consistent with the guilt of the accused and inconsistent with every reasonable supposition of innocence. If the facts and circumstances shown by the evidence are as consistent with innocence as they are with guilt, the jury would acquit the accused. In fact, this rule of construction is applicable throughout the case. If the evidence in the case as to a defendant is susceptible to two constructions or interpretations, each of which appears to you to be reasonable and one of which points to the guilt of the defendant and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit the defendant's innocence and refuse that which points to his guilt. You will note that this rule of law applies only when both of two opposing conclusions appear to you to be reasonable. If on the other hand one of such conclusions appears to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and reject the unreasonable, bearing in mind, however, that if the reasonable deduction points to the defendant's guilt the entire proof must carry the convincing force required [160] by law to support the verdict of guilty.

Under the law, I have certain functions which I have tried to lay down for you; that is, I am to instruct you as to what the law is and what law is to govern you in your deliberations. You on the other hand are to determine what the facts are. I have not tried to encroach upon your province, and I do not want you to encroach upon my province.

One of my other provinces is to determine what penalty or punishment should be meted out to the defendant, if you find him to be guilty; therefore, in your deliberations you are not to consider for any purpose whatsoever what the penalty or punishment might be if the defendant is found guilty. Remember you are judges, judges of the facts, and it is your duty to perform your duty in a non-partisan manner.

You will have with you in the jury room the exhibits in the case. You will also have a form of verdict which reads, "We the jury duly empaneled, and sworn in the above-entitled cause find the defendant, Vaughn Cecil Cowell—" and then there is a blank space— "guilty as charged in Count 1 of the Information." If you find the defendant to be guilty, you will not insert anything in the blank space. If, on the other hand, you find the defendant not guilty, you will insert the word "not" in the blank space [161] before the word "guilty."

In the Federal Court the verdict must be unanimous; therefore, before you can find the defendant guilty each one of you must determine for yourself that the defendant is guilty beyond a reasonable

doubt and to a moral certainty. If you have done so, then the foreman, whoever he or she may be, will return this verdict and sign the name under the line "Foreman." If on the other hand all of you, all eleven of you come to the conclusion that the government has failed to prove its case beyond a reasonable doubt and to a moral certainty and that a verdict of not guilty is proper, in this case the foreman would sign his name to the verdict, the foreman alone, but I want to admonish the foreman, whoever he or she may be, before you sign your name to that verdict be sure that it represents the unanimous opinion of each of the jurors.

Once again I tell you that there is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense. Consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction. If the accused be proved guilty, say so; if not proved guilty, say so also by your verdict. [162]

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the crier, but bear in mind you are not to reveal to the Court or any person how the jury stands numerically or otherwise on the question of guilt or innocence until after you have reached your unanimous verdict.

There are some legal matters I would like to take up with counsel before the case is submitted to you so I suggest to counsel it might be simpler if you go into my chambers. [163]

* * * * *

Mr. Harris: I object to—I don't believe it was an instruction but a comment on the evidence which I believe was by the Court regarding the doing or failure to do a good job by the FBI or other investigative agencies and also following that immediately on Linden's guilt or Abel's guilt, as I followed your Honor, the instruction or comment, for the reason that there is no preface or qualification of the comment in its position amongst the instructions, advising the jury that the Court while under the federal rule is allowed to comment on the testimony, such comment is not to be taken by the jury as any evidence in the case and that they are the sole and exclusive judges in that.

The Court: Thank you for calling it to my attention. I will do it right now. [164]

* * * * *

Mr. Harris: The other exception is to the Court's instruction concerning the interest of the defendant in the outcome of this case being greater than that of any other witness in the particular case. In view of the fact that we do have one and possibly two accomplices whose interest would be at least tantamount to that of the defendant and the failure to so instruct the jury in that respect in that particular instruction of the case, the exception is taken.

One other is the definition on accomplice. I take

exception to that for the reason that the instruction by the [166] Court that no corroboration was necessary, that it is my contention that corroboration would be necessary when a case is based on the accomplices' testimony alone.

The Court: You may have the exception.

Mr. Harris: And the last is that the Court's emphasis that the jury must return either a guilty verdict or a not guilty verdict would lead them to believe that they had no alternate choice or legal right to disagree.

The Court: I will tell them that.

Mr. Harris: That is all.

Mr. Guterson: I have no exceptions.

(Thereupon, the following proceedings were had in open court before the jury and with defendant present with his counsel:)

The Court: Ladies and gentlemen, I told you that the function of the Judge or the Court, as we call it, is different from that of the jury, but my attention has been called to the fact that I failed to specifically point out that you are the sole and exclusive judges of the facts and the credibility of all witnesses, and the rules which I laid down for you are merely the rules which are to govern you in your deliberations of those facts. Under the law, a federal judge has the power to sum up the evidence and to suggest conclusions thereon either as to the guilt or innocence of a defendant or the credibility [167] of witnesses or any other feature in the case. I did not exercise that option

except in one instance for the purpose of telling you what I regarded to be extraneous evidence; that is, you will recall that I said the FBI is not on trial and neither is the United States Attorney, and the only fact in question was whether the defendant is or is not guilty. I made that as a part of a comment. You are not bound by that statement although I think it is a true statement.

One other thing to which my attention has been called. I told you that in order to bring in a verdict of guilty each of you must decide for yourself that the defendant is guilty, and, likewise, you may not return a verdict of not guilty unless all of you agree thereto. The question has been asked what do you do if you never get eleven people to agree, and I tell you that that has happened in the past, and we do not expect anyone to surrender an honest opinion he or she may have. There are cases where the jury returns and says, "We are unable to agree." In this connection, I want to give you a little additional advice. It is your duty as jurors to consult with one another and to deliberate with a view of reaching an agreement if you can do so without a violation to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of [168] your deliberations, do not hesitate to reexamine your views and to change your opinion if convinced that it is erroneous, and do not surrender an honest conviction as to the weight or effect of evidence solely because of the opinion of your fel-

low jurors or for the mere purpose of returning a verdict.

As to the attitude of jurors at the outset of their deliberations, it is seldom helpful for a juror upon entering the jury room to announce an emphatic opinion on the case or his determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved, and the juror may later hesitate to recede from an announced position even when it is shown to be incorrect. Let me remind you you are not partisans. You are judges, judges of the facts, and your sole interest is to ascertain the truth. You will make a worthwhile contribution to the administration of justice if you arrive at an impartial verdict in this case.

Swear the bailiffs.

(The bailiff was thereupon sworn.)

(Thereupon, at 5:15 P.M. the jury retired to deliberate.)

(Thereupon, the following proceedings were had without the presence of the jury:)

The Court: You have an opportunity to make any further exceptions that you desire with reference to the [169] later remarks that I made.

Mr. Harris: The only other exception that I would take would be the last comment after you say that they were the sole judges on this issue of whether or not the FBI or somebody else was on trial, was your Honor's comment, "Although I think it is true." We take exception to that.

The Court: As I was giving that statement, I

felt that I appeared a little ridiculous because it is so obviously correct that this defendant is the only one on trial and the United States Attorney is not on trial and the FBI is not on trial, and that was a comment upon which I couldn't see any possible objection, and I did it because otherwise it would make me look a little ridiculous.

Mr. Harris: I might state that I did not make the objection by reason of any personal reference——

The Court: That is perfectly all right. Every one can take their exceptions. I want them to make their own record. [170]

* * * * *

[Endorsed]: Filed Oct. 17, 1957.

[Endorsed]: No. 15715. United States Court of Appeals for the Ninth Circuit. Vaughn Cecil Cowell, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 16, 1957.

Docketed: September 19, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15715

VAUGHN CECIL COWELL, Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

Comes Now the appellant and submits the following statements of points upon which he intends to rely upon appeal.

1. That the appellant was improperly convicted and his motions for dismissal at the close of the Government's case and for acquittal at the conclusion of all the evidence were improperly denied.

2. That the verdict and conviction of the defendant was contrary to the weight of the evidence and not supported by substantial evidence.

3. That the Court erred in admitting into evidence certain Government exhibits, to-wit, Exhibits 1 and 2 to which timely and proper objections to their admissibility was made at the time of the trial.

4. That the Court erred in its instructions to the jury as regarding the testimony of an accomplice.

5. That the Court erred in failing to grant defendant's motion for a new trial based upon a state-

ment of the Assistant United States Attorney made in the presence of the jury concerning defendant's counsel's right to cross-examination of the witness, David Linden.

6. That the Court erred in admonishing defendant's counsel in the presence of the jury and in commenting on the evidence during its instructions to the jury.

Dated this 3rd day of October, 1957.

/s/ RICHARD D. HARRIS,
Attorney for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed October 4, 1957. Paul P. O'Brien, Clerk.

No. 15715

United States Court of Appeals

FOR THE NINTH CIRCUIT

VAUGHN CECIL COWELL,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE GUS J. SOLOMON, *Judge*

BRIEF OF APPELLEE

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No. 15715

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FOR THE NINTH CIRCUIT

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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HONORABLE GUS J. SOLOMON, *Judge*

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FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE GUS J. SOLOMON, *Judge*

BRIEF OF APPELLEE

JURISDICTION

Appellee accepts appellant's statement of jurisdiction.

STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case.

ARGUMENT

I.

Appellant's contention with regard to the court's instructions to the jury and the testimony of an accomplice appears to be that the court should have instructed the jury that a conviction cannot be based on the testimony of an accomplice without corroboration. Appellant cites in support of his contention *Kearns* v. *United States*, 9 Cir. 27 F. 2d 854 and *Holmgren* v. *United States*, 1909, 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861. It is submitted that neither the *Kearns* case nor the *Holmgren* case stand for this proposition and that the law does not require the court to give an instruction that the testimony of an accomplice is insufficient upon which to base a conviction unless corroborated nor indeed any instruction with regard to the value of accomplice testimony.

The United States Supreme Court in 1916 in the *Diggs* and *Caminetti* cases, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, set forth the requirements which the law imposes upon a trial judge in instructing the jury where there was testimony of an accomplice. There it was urged in the trial court that an instruction be given that the testimony of accomplices was to be received with great caution and believed only when corroborated by other testimony adduced in the case.

The instruction was not given and the trial court did not instruct in any manner as to the value of the testimony of an accomplice. This court affirmed, 220 F. 545, and the United States Supreme Court in affirming said at page 495:

> "In Holmgren v. United States, 217 U.S. 509, 54 L.Ed. 861, 30 S.Ct. Rep. 588, 19 Ann. Cas. 778, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them 1 Bishop, Crim. Proc. 2d Ed., § 1081, and cases cited in the note."

That the trial court's instruction with regard to the value of the testimony of an accomplice which appears at page 5 of appellant's brief is an accurate statement of the law, is obvious in view of the *Diggs* and *Caminetti* decisions, *supra.* See also *United States* v. *Scoblick,* 3 Cir. 1955, 225, F. 2d 779; *Stoneking* v. *United States,* 8 Cir. 1956, 232 F. 2d 385, cert. den. 352 U.S. 835, 77 S.Ct. 54, 1 L.Ed. 54; *United States* v. *Bucur,* 7 Cir. 1952, 194 F. 2d 297; *Ballard* v. *United States,* C.A.D.C. 1956, 237 F. 2d 582, cert. den. 352 U.S. 1017, 77 S.Ct. 574, 1 L.Ed. 2d 554.

In connection with the analysis of the *Holmgren* and *Kearns* cases which appears in appellant's brief, this court is referred to its opinion in *Mims* v. *United States*, unreported March 28, 1958, No. 15,654, wherein it is stated at page 2 as follows:

> "The Supreme Court considered this same problem (the necessity of instructions to the jury that testimony of accomplices are to be received with great caution and believed only when corroborated by other material testimony adduced in the case) in an appeal from this Court in the famous *Diggs* and *Caminetti* cases. (1917, 242 U.S. 470, 495.) There this Court has held (1915), 220 F. 545, 552) that a refusal to instruct as to the value of the testimony of an accomplice is not error for which a judgment should be reversed. This despite the fact that in *Holmgren* v. *United States*, 1910, 217 U.S. 509, the Supreme Court had stated it was 'the better practice' to so instruct. In 1915, this Court recognized that while it might well be the better practice, 'no court, state or federal, has held that it is reversible error to refuse to so caution the jury.' 220 F. at 552.
>
> "In *Holmgren*, *supra*, a specific instruction on the subject was requested. However, it was not in proper form, for it named the alleged accomplice, as such. The fact of the witness being an accomplice was in dispute at the trial. In the *Diggs* and *Caminetti* cases the instruction requested was in proper form, leaving the finding as to whether either of the persons involved were accomplices to the jury, and requesting the admonition of care and caution to be applicable only after such finding. The instruction was refused. This Court held the general instructions given were sufficient and that there was no error. In reviewing the matter and in affirming this Court's holding of

> no error in the trial court's refusal of the instruction offered, the Supreme Court (242 U.S. 470, 495) cited the *Holmgren* case and stated that 'there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them'."

Further, in connection with appellant's contention with regard to the trial court's instruction on the value of accomplice testimony, it is pointed out that no proposed written instruction on this subject was presented to the trial court as required by Rule 30, nor was a copy of any such proposed instruction served upon counsel for the Government. See *Schuermann* v. *United States*, 8 Cir. 1949, 174 F. 2d 397, 401, cert. den. 338 U.S. 831, 70 S.Ct. 69, 94 L.Ed. 505.

II.

In his argument under Point 2, the appellant contends that the trial court erred in commenting on the evidence during its instructions to the jury. The comment referred to by the appellant appears at page 25 of the transcript as follows:

> "The Court: Ladies and gentlemen, I told you that the function of the Judge or the Court, as we call it, is different from that of the jury, but my attention has been called to the fact that I failed to specifically point out that you are the sole and exclusive judges of the facts and the credibility of all witnesses, and the rules which I laid down for you are merely the rules which are to govern you in your deliberations of those facts.

> Under the law, a federal judge has the power to sum up the evidence and to suggest conclusions thereon either as to the guilt or innocence of a defendant or the credibility of witnesses or any any other feature in the case. I did not exercise that option except in one instance for the purpose of telling you what I regarded to be extraneous evidence; that is, you will recall that I said the FBI is not on trial and neither is the United States Attorney, and the only fact in question was whether the defendant is or is not guilty. I made that as a part of a comment. You are not bound by that statement although I think it is a true statement."

In support of his contention appellant cites the case of *McAllister* v. *United States*, C.A.D.C. 1956, 239 F. 2d 76. It is submitted in connection with this point that a proper reading of the *McAllister* case does not involve the question of whether or not the trial court's remark was or was not prejudicial but simply the issue of whether or not that question could be raised on appeal where no exception was taken to the remark during the trial.

An accurate statement of the power of a trial court to comment on the evidence is contained in *United States* v. *Stayback*, 3 Cir. 1954, 212 F. 2d 313, cert. den. 348 U.S. 911, 75 S.Ct. 289, 99 L.Ed. 714 at page 319:

> "It is no longer an open question that a judge of a court of the United States may, in his discretion, express his opinion on the evidence and the credi-

> bility of the witnesses. The only proviso is that the jury should be made to understand that it is in no way bound by any observations of the court, and that it is the sole judge with respect to the issues of fact."

In *Bernal-Zazuta* v. *United States*, 1955, 225 F. 2d 60, 62, this court said in connection with the trial court's comments to defense counsel during examination of a witness:

> "But this is not the rule in the federal courts, where the trial judge is not assumed to be an automaton, but is charged with responsibility to see that the trial is fair to the government as well as to the defendant and that it moves with speed consistent with justice. Furthermore, a trial judge, even in a criminal case, is not bound by the rule of some state courts, but is permitted to instruct the jury upon the facts and to comment upon the credibility of witnesses. *It is notable that in the incidents complained of here the court did not pretend to be dealing with the guilt or innocence of defendant.*" (Italics supplied)

Similarly, in the instant case, the comment objected to did not concern the guilt or innocence of the defendant or even the credibility of the witnesses and in view of the court's instruction that the jury was the sole and exclusive judge of the facts and the credibility of all witnesses, the comment complained of cannot be considered prejudicial. It is believed that the trial judge's comment that neither the FBI nor the United States Attorney was on trial in this case concerned

what the trial judge accurately characterized as "extraneous evidence".

Pon Wing Quong v. *United States*, 9 Cir. 1940, 111 F. 2d 751 involved an appeal from a prosecution for importing, facilitating the transportation of, concealing and facilitating the concealment of, opium where the presumption that opium found in the United States had been imported unlawfully was not rebutted. The trial judge commented in his instructions "I do not think it will be denied that this opium was imported into the United States from China," where there was no evidence of the source of this opium. This court disposed of the contention that the comment was prejudicial in the following sentence at page 758: "Whether it came from China or some other foreign state is of no importance." It is urged that the trial judge's comment objected to in this cause related to "extraneous evidence" which was of no importance in the trial.

CONCLUSION

It is submitted that neither of the two points raised in this appeal are meritorious and that no prejudicial error occurred during the trial. The appellee requests that the judgment be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

JEREMIAH M. LONG
Assistant United States Attorney

No. 15715

United States Court of Appeals

For the Ninth Circuit

VAUGHN CECIL COWELL, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
HONORABLE GUS J. SOLOMON, *Judge*

BRIEF OF APPELLANT

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
HONORABLE GUS J. SOLOMON, *Judge*

BRIEF OF APPELLANT

JURISDICTION

The United States Attorney for the Western District of Washington filed an information consisting of one count, charging the appellant, Vaughn Cecil Cowell, with a violation of Title 18, U.S.C., Section 659, rendering it unlawful to steal from a wharf, vodka of a value not in excess of $100.00, and convert it to his own use, said vodka being a part of a shipment in interstate commerce (R. 3). The appellant entered a plea of not guilty and the case was tried before a jury, which rendered a verdict of guilty (R. 4).

The court subsequently sentenced the appellant to six months' imprisonment (R. 5).

After entry of judgment and commitment, the appellent gave timely notice of appeal (R. 6), in accordance with Rule 37 of the Federal Rules of Criminal Proce-

dure (Title 18, U.S.C.) and perfected the same in accordance with Rule 39 of the Federal Rules of Criminal Procedure and the Rules of the Court of Appeals, Ninth Circuit.

STATEMENT OF THE CASE

The appellant, Vaughn Cecil Cowell, a resident of Seattle, Washington, for several years, and a man fifty-three years of age who worked as a longshoreman on the Seattle waterfront for approximately twenty-five years, was arrested on March 4, 1957, for the misdemeanor set forth in the information alleged to have occurred on February 13, 1957, at Seattle, Washington. He had a preliminary hearing before the United States Commissioner on March 11, 1957, and subsequently his case came on for trial before the United States District Court for the Western District of Washington, Northern Division, on July 9, 1957, and a verdict of guilty was returned on the same day.

The testimony showed on the night of February 13 and the early morning of February 14, 1957, the appellant, David Linden and Daniel Abel, were unloading a vessel that was docked at Pier 50 in Seattle, Washington. That part of the cargo discharged from the vessel was located in the warehouse on Pier 50 and consisted in part of several cases of vodka. During the course of the evening, it was testified by David Linden that he observed the appellant go over by the cases of vodka and take a bottle of vodka from one of the cases, come directly back to where David Linden was standing, which was from ten to twenty feet, hand the bottle of vodka to Linden and then the appellant left. Another witness

observed David Linden take this bottle, place it under a bull-rail and subsequently during the course of the evening, this witness, with the assistance of another witness, replaced the bottle of vodka placed under the bull-rail by David Linden, with another bottle of vodka which they continued to observe, and later on in the same evening, David Linden returned to the bull-rail, took the substituted bottle of vodka, drank its contents and threw the bottle over the side.

The Federal Bureau of Investigation questioned the appellant on February 20, 1957, at which time he denied any connection with the theft of the vodka. Subsequently, the appellant was arrested, tried and convicted as previously set forth.

During the course of the trial proceedings, the appellant requested an instruction on "accomplice" (R. 9), and cited to the court, *Holmgren v. U. S.,* 217 U.S. 509, p. 523 (R. 9). Thereafter the court instructed the jury (R. 10).

SPECIFICATIONS OF ERROR

1. That the court erred in its instructions to the jury regarding the testimony of an accomplice.

2. That the court erred * * * in commenting on the evidence during its instructions to the jury.

ARGUMENT

Point 1. That the Court Erred in Its Instructions to the Jury as Regarding the Testimony of an Accomplice.

Throughout the trial, the only testimony conclusively connecting the defendant with the violation charged was the testimony of David Linden. This was apparent

to the trial court throughout the entire proceedings. At the conclusion of all the testimony and prior to instructing the jury, the trial court's attention was called to a request for an instruction on "accomplice." Likewise, the case of *Holmgren v. U. S.,* 217 U.S. 509, at p. 523, was called to the court's attention (R. 9). In view of the fact that this case was cited to the trial court and it was requested that it would undoubtedly be better practice for the court to caution juries in reliance on testimony of accomplices, and to require corroborating testimony before giving credence to them (R. 10), and while this fact had been pointed up to the court, and received approval at least in previous cases handed down from the Ninth Circuit, it was felt that the trial court should have instructed more particularly and fully on the question of accomplice. Further, during the course of the instructions, the court indicated,

> "I want to point this out as a matter of comment, that the defendant is the only one here on trial * * *. There was evidence concerning Mr. Linden's activities and I will tell you about that also later as to the weight you could give his statement, but now I merely state that whether Mr. Linden is likewise guilty of a crime, or Mr. Abel was guilty of some offense, is not involved in this case only to the extent of the credibility of those witnesses. I want to direct your attention once again to the fact that if you find beyond a reasonable doubt and to a moral certainty, that the defendant is guilty of this crime, you should bring in a verdict of conviction regardless of whether other people might also be guilty of a crime * * *." (R. 12-13)

In the above instruction, the court had pointed out

that "there was evidence concerning Mr. Linden's activities, and I will tell you about that also later as to the *weight* you can give his statement," the court was obviously and pointedly indicating to the jury to expect something particular as far as Mr. Linden's testimony was concerned. The court commented further:

> "As you can see from the testimony, this case bristles with issues of veracity. In instances too numerous to mention, the testimony of witnesses called by the Government, is flatly contradicted by the testimony of the defendant himself." (R. 16-17)

The court instructed on the question of accomplice in the following particular (R. 20):

> "All evidence of a witness who is connected with the commission of the offense charged should be considered with caution and weighed with great care. One who is connected with the commission of the offense charged is referred to as an accomplice. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain the verdict of guilty even though not corroborated or supported by other evidence, but I instruct you that before you may find a verdict of guilty on the unsupported evidence of an accomplice, you must believe that evidence beyond a reasonable doubt and to a moral certainty. In other words, his testimony alone must establish the guilt beyond a reasonable doubt and to a moral certainty."

This instruction alone without more on the case would probably have covered the matter in question. However,

with the circumstances of this particular case, together with the position of this instruction in the over-all instructions of the court, together with the court's comments on the evidence and reference to various matters, it appears that the appellant did not receive a fair trial in view of the above instruction submitted to the jury. Exception was taken by the appellant to the instruction and also the manner in which it was given (R. 24).

Further, on the question of the accomplice instruction, the court's attention is called to *Kearns v. U. S.*, 27 F.2d 954 (C.C.A. 9th) at page 856:

> "While the testimony of an accomplice is to be treated like that of other witnesses and considered for all purposes and may be believed, such testimony is not regarded with favor, but should be received with caution and should be closely scrutinized and viewed with distrust, and even under the common law rule that it is not essential that testimony of accomplices be corroborated, the jury should be instructed as to the danger of convicting upon the evidence of accomplices alone." 16 C.J. 694.
>
> "In *Holmgren v. U. S.*, 217 U.S. 509 (523) * * * the court said, "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to them. But no such charge was asked to be presented to the jury by any proper request in the case, and the refusal to grant the one asked for was not error."

In the same case, the court continued on to say:

> "A proper instruction on the testimony of accomplices should have been given, but the request

here made was not a proper one. By the request, the guilt or innocence of the parties charged was made to depend solely on the credence given to the testimony of the accomplice, regardless of corroborating testimony, and regardless of any other consideration."

It is therefore submitted that the *Kearns v. U. S., supra,* case is authority for the proposition that when the proper request is made by the defendant for an accomplice instruction, that the request should be honored by the trial court. If this is not the law in this Circuit, then the *Holmgren v. U. S., supra,* case should be distinguished and set aside. In the instant case, the *Holmgren* case was called to the attention of the trial court, exceptions were taken, and the record, I believe, is clear on that issue (R. 9).

Point 2. That the Court Erred in Commenting on the Evidence During Its Instructions to the Jury.

The trial court during the course of the proceedings took more than a healthy interest in the trial of the case. The instructions reflect that interest by various "comments" intermingled throughout the court's instructions to the jury (R. 12, 13, 14, 16). The case took one day to try, including the selection of the jury, all the opening statements and arguments, the review of the instructions, the trial of the case, submitting the case to the jury, and the return of the verdict. It was manifestly short in duration and the jury had the benefit of all the testimony and proceedings, which in effect should have reduced the number of comments required by the trial court.

The appellant objected, particularly to the court's comment regarding the doing or failure to do a good job by the F.B.I. or other investigative agencies, commingling this with comments concerning Mr. Linden and Mr. Abel (R. 12-13). This was called to the court's attention by the appellant (R. 24). Subsequently, the court did call the jury back and instructed the jury concerning the question that they are the sole and exclusive judges of the facts and credibility of all the witnesses (R. 25), and stated further that the federal judge has the power to sum up the evidence and to suggest conclusions thereon, either as to the guilt or innocence of the defendant or credibility of witnesses, or any other feature in the case (R. 25). Then the court went on to say:

> "I did not exercise that option except *in one instance for the purpose of telling you what I regarded to be extraneous evidence;* that is, you will recall that I said the F.B.I. is not on trial and neither is the United States Attorney, and the only fact in question was whether the defendant is or is not guilty. I made that as a part of a comment." R. 26)

Had the trial court stopped at that point there would have been no complaint on the part of the appellant. However, the court continued on immediately after that to say:

> *"You are not bound by that statement although I think it is a true statement."* (R. 26)

This additional comment made and emphasized by the court in the light of what had transpired previously was again excepted to by the appellant and the particular language called to the trial court's attention (R. 27).

The trial court's response as to why it made that remark was to the effect that had he not made that remark, he would have "looked a little ridiculous" (R. 28). It is contended by the appellant that the primary concern of the trial court should be that the defendant is afforded a fair trial. Nothing more, nothing less. In *McAllister v. U. S.,* 239 F.2d 76 (D.C., 1956), the Circuit Court stated that the trial court's instruction and comment "To reach a verdict * * * should not invoke any difficulty." The court in that case stated, "that appellant on appeal had contended that this interfered with the jury's deliberation and encouraged it to return a guilty verdict. Clearly, this gratuitous remark was not well advised. But defendant counsel did not object below as required * * * and in the circumstances of this case, we cannot say that refusal to consider the matter on appeal will result in manifest injustice." That is not the situation in the instant case. Here the matter was called to the trial court's attention on not one, but two, occasions, and no once, but twice, was the adverse comment made by the trial court, which resulted in the defendant not receiving a fair trial.

CONCLUSION

It is urged that the two points raised here on appeal are meritorious in view of the language of the various appellate courts, and either one or both of the alleged errors are grounds sufficient to grant to the appellant a new trial.

Respectfully submitted,

RICHARD D. HARRIS
Attorney for Appellant.

No. 15716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY B. BISTLINE,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

F. M. Bistline,

R. Don Bistline,

Attorneys for Appellant,

Pocatello, Idaho

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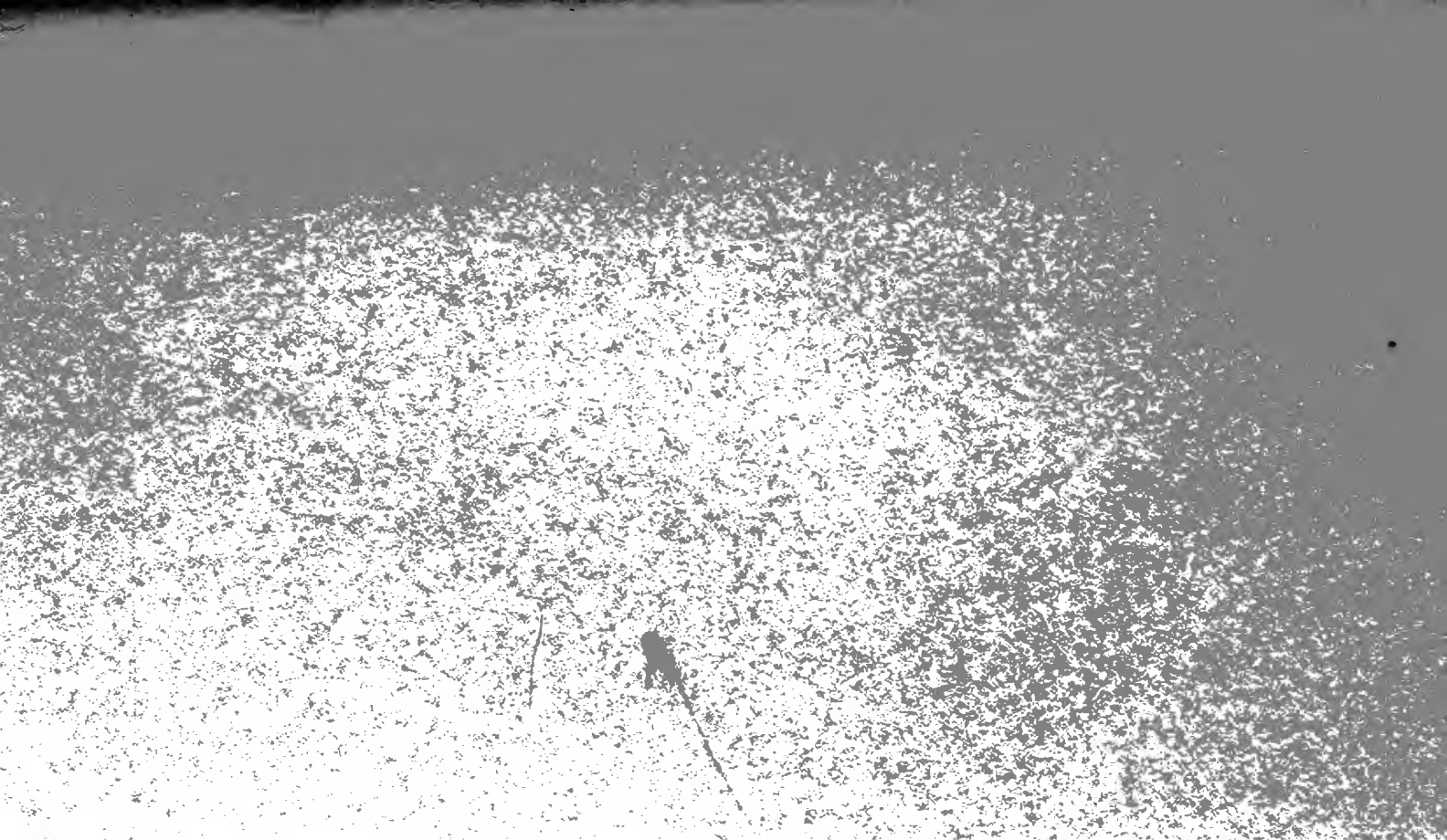

No. 15716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY B. BISTLINE,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

F. M. Bistline,

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JURISDICTION

This action is for the recovery of certain income taxes paid by appellant to appellee for the years 1947 and 1948. The Internal Revenue Bureau disallowed certain long-term capital gains claimed by appellant in her returns for those years and set up a tax deficiency by reason thereof. Appellant paid the taxes so assessed and thereafter filed a claim for refund which was disallowed after which appellant filed this suit. These facts appear in appellants complaint (Tr. page 3).

Federal Statutes conferring jurisdiction are:

28 USCA Sec. 1346: 68 Stat. 589;

28 USCA Sec. 7422; 68A Stat. 876.

STATEMENT OF THE CASE

The main facts were stipulated by counsel (Tr. pp. 31-37). Briefly summarized the stipulation is to the effect that appellant's father and mother, F. M. and Anne Bistline, on July 1, 1947, by two gift deeds conveyed certain parcels of vacant lots in Pocatello, Idaho, to appellant, together with two parcels of improved property. The legal descriptions of the separate parcels appear on pages 31, 32 and 33 of the transcript. At the time appellant received this property she was 24 years old and employed full time as business manager of the Pocatello Transit Company, which operated buses in Pocatello.

During 1947 she made three sales of vacant lots: (1) 2 lots to Kenneth Draper; (2) 1½ lots to Thomas J. Coates; (3) 1½ lots to Albert Anderson. In 1948 four sales were made: (1) 4 lots to H. A. Peterson; (2) 61 Lots to Pocatello Heights, Inc., for apartment house sites; (3) 56 lots to Empire Investment Company for a subdivision development; (4) 1½ lots to Edward F. Brick. (Tr. pp. 34, 35). Said sales were respectively reported in her 1947 and 1948 income tax returns on a long-term capital gain basis. (End stipulation summary).

All the parcels in Blocks 2 through 9, Block 11, and Blocks 21 through 27 were raw, sagebrush land, or part of an exhausted gravel pit with holes as deep as fifty feet. All

this ground was inaccessible except for some improved dirt roads. Individual lots could not be identified without a survey. The streets were not graded or marked, there were no water lines, sewers or curbs and gutters serving any of these lots. (Tr. pp. 49, 54, 55, 63. Exhibit No. 1). Due to their condition no market for these lots for residential purposes existed. (Tr. p. 55).

The remaining parcels (16), except Block 44, were scattered town lots, and for the most part had graded streets and sewers, and in some instances, sidewalks, oiled streets, and curbs and gutters. Block 44 was of the same character as the area described in the preceding paragraph and was part of it except for a gravelled street on the west.

The seven sales were made in much the same manner in that in each instance the prospective purchasers checked the ownership of the property in the county records and upon finding that appellant owned same contacted appellant's father, F. M. Bistline, with regard to purchasing it without any activity on the part of appellant or her father with regard thereto (Tr. 41, 42, 43, 44, 46, 62). Prior to the conveyance of the property to appellant sales had been refused of lots for residential purposes in the area subsequently acquired by the Pocatello Heights Apartments, which was in a Class A residential Zone. (Tr. 43, 55).

On June 27, 1948, appellant and A. R. Spaulding were married. A decree of divorce was granted them September 1, 1949, dissolving the marriage. A joint income tax return

was filed for 1948 by appellant and her then husband. The property sold by appellant, the subject matter of this suit, was her separate property.

Trial was had wthout a jury and judgment rendered for the defendant from which this appeal is taken.

QUESTION INVOLVED

The question involved is whether or not appellant is entitled to long-term capital gain treatment on the three real estate sales in 1947 and the four real estate sales in 1948.

SPECIFICATION OF ERROR

The District Court erred in entering judgment denying appellant the right accorded by the Statutes in such cases made and provided to pay her income tax on one-half of the gain realized by her on each of the sales of land made in 1947 and 1948, for the reason that the evidence conclusively establishes that such property was not held by her primarily for sale to customers in the ordinary course of her trade or business.

SUMMARY OF ARGUMENT

1. Where property is acquired by taxpayer and sales made with little or no activity on his part, the profits realized therefrom are entitled to capital gain treatment.

Camp vs. Murray, 226 F 2d 931;

Smith vs. Dunn, 224 F. 2d 353;

Martin vs. U. S., 119 Fed. Sup. 468;

McConkey vs. U. S., 130 Fed. Sup. 621;

Hebenstreit vs. U. S., 55-2 USTC p. 9571;

Adam Schantz Corp vs. Com'r., 11 TCM 424;

Loewenberg vs. Com'r., 7 TCM 702;

Kleberg, Est. of vs. Com'r., 5 TCM 858;

Ellis vs. Com'r., 13 TCM 15;

Three States Lumber Co. vs. Com'r., 158 F. 2d 61;

Guthries vs. Jones, 72 Fed. Sup. 784;

Storrow vs. U. S., 99 Fed. Sup. 672;

Frieda E. J. Farley, 7 T. C. 198;

Est. of Mackall vs. Com'r., 3 TCM 701;

Southern California Law Review Vol. 29, No. 1. December, 1955, p. 116.

46 ALR., 20, 623 ET. SEQ.

2. Where real estate is held as an investment, profit on the sale of such property is entitled to long-term capital gain treatment.

Lobello vs. Dunlap, 210 F. 2d, 465;

Goldberg vs. C. I. R., 223 F. 2d 709;

Malouf vs. Ridell, 52-1 USTC p. 9296;

Farry vs. C. I. R., 13 T. C. 8;

Jones vs. C. I. R., 1 TCM 816;

Miller vs. Com'r., 20 BTA 230;

Hutchinson vs. Com'r., 8 TCM 597;

Victory Housing vs. Com'r., 205 F. 2d 371;

Delsing vs. U. S., 186 F. 2d 59;

McGah vs. Com'r., 210 F. 2d 769;

Burkhard Invest. Co. vs. U. S., 100 F. 2d 642;

Fahs vs. Crawford, 161 F. 2d 315;

Harriss vs. Com'r., 143 F. 2d 279;

Boomhower v. U. S., 74 F. Supp. 997;

Dunlop vs. Oldham Lumber Co., 178 F. 2d 781;

Ross vs. Com'r., 227 F. 2d 265;

Collin vs. U. S., 57 F. Supp. 217;

McKay vs. Bowers, 53-2 USTC p. 9535;

Vaughn vs. Com'r., 7 TCM 288;

Fahs vs. Taylor 239 F. 2d 224;

E. R. Fenimore Johnson, 19 TC 93.
46 ALR. 2D 623 ET SEQ.

3. Where taxpayer received a tract of land by gift from father and devoted a relatively small amount of time to its supervision, and at no time held himself out as a dealer in real estate, he was entitled to long-term capital gain treatment on profits derived from sale of such land.

Sparks vs. United States 55 Fed. Supp 941.

4. Where taxpayers inherited property from their mother, and sales of 161 lots were made over a period of six years by their father on their behalf, without any effort on his or their part, the property was held to be capital assets and entitled to long-term capital gain treatment.

Gruy vs. Commissioner, 8 TCM 787.

FEDERAL STATUTES INVOLVED
INTERNAL REVENUE CODE (1939) Title 26, Section 117 (a) DEFINITIONS. As used

in this chapter (1) CAPITAL ASSETS.— The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business * * *.

(4) LONG-TERM CAPITAL GAIN. — The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income.

ARGUMENT

It is appellants contention that the property in question was being held as an investment and that the three sales in 1947 and the four sales in 1948 do not constitute sufficient frequency and continuity to classify appellant as a dealer in real estate within the meaning of the statute.

AUTHORITIES: See cases cited under SUMMARY OF ARGUMENT

Paragraphs numbered 1 and 2.

Vol. 29, No. 1, Southern Cal. Law Review, Dec. 1955, page 116. Annotation 46 ALR 2D 623 ET SEQ.

Two special situations occur in this case. One has to do with a parent conveying property to a child, and the other has to do with a parent giving counsel and advice and assisting in handling sales.

The first of these situations is covered by the case of *SPARKS VS. U. S.*, 55 F. Sup. 941 (D. C. Ga.,). Here the father deeded by gift two subdivisions to his son in November, 1937. The father had previously platted the property and had even held an auction sale in an attempt to dispose of the lots. However, for a number of years before deeding to the son he had been inactive and no effort had been made to keep up the improvements. Quoting from the case:

> "Plaintiff's father was holding the property with the belief that it was steadily enhancing in value because it lay adjacent to Shirley Hills, a highly developed residential suburb of the City of Macon.

After the son acquired the property he made a sale of certain unsold lots; granted a 50-foot right-of-way for the purpose of a roadway, and at his own expense connected certain drives with the county highway, repaired the roads, paved one road, surveyed further roads and paid out approximately $3000 for such improvements and in addition conveyed two lots of the approximate value of $1500 for certain other improvements. In 1939 he was approached by certain parties who advised him that the Rental Housing Division of the Federal Housing Administration desired to have constructed in Macon a garden type apartment house under the FHA

insured loan plan, and that a representative of FHA had selected certain of his property for that purpose. The apartment was built resulting in a demand for more lots which he sold. In holding that plaintiff was entitled to long-term gain benefits, the court said:

> "When plaintiff originally acquired the lands from his father it was his purpose and intent to improve the same so as to enhance their ultimate value so as to enable him to make sufficient sales to liquidate the bank indebtedness, if that were possible. * * * While plaintiff had planned and hoped to make sales of lots or other portions of said lands for the purpose of liquidating the bank indebtedness, his *primary purpose* not only in going into the apartment house project, but in making other improvements shown by the evidence *was for the ultimate enhancement in value of the entire tract,* and plaintiff's activities were carried on with that in mind and with the view of making more readily salable some of the property in the Lone Oak Drive Subdivision and in the immediate vicinity of the apartment house for the purpose of liquidating the bank debt. (Italics supplied).

The other situation with regard to the parent counselling and assisting in the sales is the case of GRUY VS. COMMISSIONER, 8 TCM 787 (Texas 1949). In that case the taxpayers inherited the property involved from their mother, and at the time the sales were made they were college and high school students. The sales were all made by the tax-

payers' father on their behalf and were: 14 lots in 1939; 24 lots in 1940; 15 lots in 1941; 14 lots in 1942; 54 lots in 1953; 40 lots in 1944. Petitioners negotiated no sales nor made any effort to sell the lots. Civic leaders of the community interested in the town's growth urged the father to put on a selling campaign of the lots but he refused. He regarded them as a safe investment and was indifferent as to selling, and made no effort to make sales. The purchasers, unsolicited in each instance, went to the father and made offers to buy, and when he deemed the rice offered sufficiently attractive it was accepted. The lots were not listed for sale, nor advertised, nor was a "for sale" sign placed on them. No improvements were made on the lots by petitioners or their father. The court said with regard to the increase in sales activity:

> "The economic conditions produced by the war caused a great demand in 1943 and 1944 for the purchase of lots. The facts show that neither petitioners personally nor through their father were engaged in the real estate business, and the lots were not held primarily for sale to customers. The sales appear to have been essentially in the nature of a gradual and passive liquidation without 'extensive development' and 'sales activity'."

By comparison we have in the instant case only seven sales made in two years compared with 161 transactions in six years in the Gruy case, yet in that case the Tax Court held that the taxpayers were entitled to long-term capital gain benefits.

It is to be noted in the instant case that appellant's father regarded this property as a good investment and was not particularly interested in selling it (Tr. p. 62). No effort was made by appellant or any one for her, to list the property for sale, advertise it, or do anything to make it marketable, such as adding improvements. (Tr. page 46). When Mrs. Mitchell tried to purchase a building site in the area which was subsequently purchased by the Pocatello Heights, Inc., for an apartment project, she was refused. (Tr. p. 43).

Another case we wish to make special reference to is *Storrow vs. U. S.*, 99 F. Supp. 672 (1951) (S. D. Calif. C. D., U. S. D. Ct.). During the taxable year 1944 three sales were made by taxpayer by her trustee, California Trust Co. Seventeen lots were sold to one buyer in one transaction, one lot improved with a restaurant building was sold to the same buyer in another transaction, and in the third transaction, to a different buyer, taxpayer sold one parcel consisting of 11.44 acres of land. This case is as near to being on "all fours" with the instant case as any that have been cited. There are a few minor distinctions which should be pointed out: In the Storrow case the property was inherited, in the instant case it was a gift. Mrs. Storrow made her sales through a trustee whereas appellant made her own sales. From 1942 until her death in 1950 Mrs. Storrow suffered from strokes and diabetes and was confined to her bed, including 1944, the year in question, while in the case at bar appellant was well and employed by the Pocatello Transit Company. The California court held that taxpayer was entitled to long term capital gain on her real estate transactions, and we wish

to emphasize the point that the government did not appeal this decision. In our search of the cases we have noted that in each instance where the taxpayer has been allowed capital gain treatment on the sales of real estate the government has chosen not to appeal, which would indicate that taxpayers should be allowed the relief granted them by the law with regard to long term capital gain in cases such as the one here.

In our STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT (Tr. 73-77) five distinct points have been enumerated relating to the sales therein set forth. These are herewith presented in the order in which they appear:

1. The sales of 56 lots to the Empire Investment Company. This property was located in the undeveloped sagebrush and exhausted gravel pit area heretofore described. They were purchased by the Empire Investment Company for the purpose of developing a subdivision, which was subsequently developed at great expense and is known as "College Terrace." Mr. Rolland M. Smith, under whose guidance this subdivision was developed had been in the real estate business 15 years. He had developed nine subdivisions with an average of about 200 houses in each and had sold about 1,800 lots in such deals. He testified that this property, although so zoned, had no market value as residential lots. (Tr. p. 55).

We have made an intensive search for cases touching upon the point of unmarketable property being held for sale in the

ordinary course of the trade or business of a taxpayer, but have been unable to find any. In all the cases we have found where such a situation existed, we noted that the situation had been remedied by the taxpayer taking some steps to make the property marketable, and in the cases we have cited the court nevertheless held that the taxpayers were entitled to long-term capital gain benefits.

Sparks vs. U. S., Supra;

Gruy vs. Commissioner, Supra.

Cases cited SUMMARY OF ARGUMENTS, paragraphs I, II.

Therefore a question naturally arises: Where property is restricted to a specific purpose, residential in this instance, and no market exists for the lots in their then condition, how can it be construed that they were being held for sale in the ordinary course of the taxpayer's business?

2. The second point (Tr. 74) is with regard to the sale of Block 44, 36 and 27 and Lots 19 and 20 of Block 21 of Pocatello Townsite to the Pocatello Heights Apartment Corporation in one transaction. In connection therewith, we urge that the evidence shows that this property was not being held for sale in that attempts had been made to buy the same and sales were refused. (Tr. 43) and that this sale was made under very special circumstances which are set forth in the testimony of the witness O. R. Baum. (Tr. p. 37-40). Also, that the sale was made in the public interest,

and not because of any particular desire on the part of appellant to sell same.

We particularly call attention to the case of *Gruy vs. Commissioner,* supra, in support of our position on this point. This sale, like the sale to the Empire Investment Company falls into a distinct category, perhaps different somewhat from the five small sales, because the evidence clearly shows that this property was being withheld from the market with a view to possible future development. (Tr. page 62,) and should be given special treatment by the court.

3. The third point (Tr. p. 75) is with regard to the sales of 2 lots to Draper, 1½ lots to Coates, and 1½ lots to Anderson. In each of these cases the purchasers sought the lots. Quoting Albert Anderson (Tr. p. 44): "I happened to become interested in that lot because they were next door to me and I tried pretty near two years to get it and finally I got it. I first talked to F. M. Bistline about the lot about 15 years ago and it took pretty near two years before a sale could be made."

Also quoting Thomas J. Coates (Tr. p. 42): "During the year 1947 I inspected some lots on North 6th Avenue with the view to buying them. I don't recall the description now, and at the time I was inspecting the lot I didn't know the number, but I do know it was on 6th and Bridger. I went to the Court House and found out. After I went to the Court House I got in contact with the owner and they sent us to F. M. Bistline and subsequently a contract was signed and the sale made."

4. The fourth point (Tr. 76) is with regard to the sale of the four lots to H. A. Peterson and 1½ lots to Brick. These sales it is to be observed from the testimony of both Mrs. Peterson and Mr. Brick, were wholly unsolicited on the part of appellant or anyone on her behalf. The sales happened to go through the Smith-Marshal Agency, principally because its name had formerly been Bistline Realty Company, and not because of any listing of the lots with them. (Tr. p. 41, p. 44). At this point it might be well to mention the matter of a "for sale" sign having been placed on these lots by Wendell Marshall of the Smith-Marshall Agency. (Tr. 65). This was denied by Rolland M. Smith, the head of the firm (Tr. p. 58). If the sign ever was on the lots, there is no evidence that appellant ever authorized it or even knew it was there. Under the circumstances we feel that these sales fall into the same category as the sales under Point 3.

5. The fifth point (Tr. 76, 77) is the general issue raised by our assignment of error and the entire brief applies thereto.

We desire to draw the court's attention to the matter of their being a book in the office of Smith-Marshall Company, which the witness Marshall referred to as listings (Tr. p. 65). This list was there while F. M. Bistline was connected with the Bistline Realty Company, the predecessor of the Smith-Marshall Agency. It was not added to or kept current. (Tr. 65). Attempts to get listings by Mr. Marshall were unsuccessful (Tr. 66). The only one that he said he succeeded in getting was the 4 lots sold to Peterson, and that was after Peterson had contacted him with regard to

purchasing the lots. (Tr. 65, 66). But we want to particularly quote Mr. Marshall's testimony:

> "None of the lots that Mr. Smith and I bought from Beverly and you in what later became College Terrace Addition were in that book. And it did not contain a listing of any of the lots that the Simplot people bought in Pocatello Heights." (Tr. 66).

Also his statement: "Beverly never gave us any listings" (Tr. p. 65).

We are not unmindful of the holding of this court in the case of *Ehrman vs. Commissioner*, 120 F. 2d 607 (1941), for the reason that this is the main case the Trial Judge relied upon. However, we feel that the evidence in the instant case clearly does not bring it under the Ehrman rule, on account of the difference in the situations. In that case 186 lots were sold in the year 1935. The court avoids stating how many sales were made.

With regard to the *Ehrman* decision we call the court's attention to the article in Southern California Law Review, Vol. 29, No. 1, December, 1955, pages 120, 121 entitled "Capital Gains on Real Estate Subdivisions". We quote from it:

> "The net effect of the *Ehrman* decision was to make frequency and continuity of transactions the sole test of whether capital gains treatment is available. The court held that an individual with frequent and

continuous transactions is in business. Then on finding the individual in business it treats him as a "dealer" without regard to the fact that he has no established place of business and no regular employment in purchasing real estate and reselling it to customers. The result is that a person can have numerous *security transactions* during the year without losing the benefits of the capital gains provisions, whereas a person with an equal number of real estate transactions will be held to have ordinary income.

"Section 1237 which was added by the Internal Revenue Code of 1954 seems to be tailored to fit the Ehrman case and would have allowed capital gain treatment to taxpayers in that case had it been in effect at the time the sales were made. * * *

"The section appears to do little more than to preclude the Commissioner's use of evidence of subdividing and activity against the taxpayer in certain limited cases. It would seem that a taxpayer who has subdivided and sold land which he has held under five years, or which for some other reason does not qualify under section 1237, could still get capital assets treatment on the basis of case law if he were to take an extremely passive attitude toward the sales and turn all details over to an independent broker. In the Ninth Circuit the taxpayer would have to overcome the *Erhman* case, but by now a sufficient conflict has developed between the Fifth and Ninth

Circuits that he could probably carry his case to the Supreme Court in case of an adverse decision."

The author of that article in her conclusion observes: (Page 125);

"By resorting to some fairly complicated devices a taxpayer who has purchased land can assure that his gains on sale will be taxed as a low rate. Logically he should also be able to claim that he is entitled to capital gains treatment if he is not a 'dealer.'

"A taxpayer who has inherited land can obtain capital gains treatment more easily. If he is in the Ninth Circuit * * * he can pay his tax as on ordinary income and file a claim for refund and, if this is denied, sue in the Court of Claims which has held in favor of a taxpayer. He may be able to bring himself within the provisions of section 1237 so that evidence of subdivision and of activity incident thereto cannot be used to find that the gain is ordinary income. The last alternative is that if he is a Ninth Circuit taxpayer who has to contend with the *Ehrman* decision, he can show the errors in reasoning on which that decision is based."

CONCLUSION

We have cited a number of reverse cases where land was sold at a loss under circumstances similar to the ones here, e. g., *Fahs vs. Taylor,* 239 Fed. 224 (5th) and the taxpayer was contending that he was in business and entitled to 100% ordinary losses. In such cases the Government would have none of it. They consistently have taken a position in such cases that they are capital losses. We would like to suggest to the court that before coming to a final conclusion that it assume that instead of appellant having made a profit, that she had taken a loss on each of these transactions. The rule should certainly be tested both ways.

In conclusion we submit that on the facts of the case and the law applicable thereto that appellant is entitled to a reversal with instructions that judgment be entered for her as prayed in her complaint.

Respectfully Submitted,

F. M. Bistline,

R. Don Bistline,

ATTORNEYS FOR APPELLANT.

Pocatello, Idaho.

No. 15, 716

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

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OPINION BELOW

The memorandum opinion of the District Court (R. 21-25) is reported at 145 F. Supp. 800.

JURISDICTION

This appeal involves federal income taxes. Appellant filed timely income tax returns for the years 1947 and 1948 and thereafter the Commissioner of Internal Revenue assessed and collected additional taxes, in the amount of $396.54 for 1947, and in the amount of $2,787.42 for 1948. (R. 26-27.) After payment claims for refund were filed on March 4, 1952, and were rejected on April 8, 1953. Within the time provided in Section 3772 of the Internal Revenue Code of 1939, and on March 7, 1955, the taxpayer brought an action in the District Court for recovery of the taxes paid. (R. 3-17.) An answer was filed on behalf of the United States on May 9, 1955. (R. 17-21.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. Judgment was entered on June 14, 1957. (R. 29.) Within sixty days and on August 9, 1957, a notice of appeal was filed. (R. 30.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly held that the real property sold by taxpayer in 1947 and 1948 had been held primarily for sale to customers in the ordinary course of business within the meaning of Section 117 of the Internal Revenue Code of 1939, so that the profit realized should be taxed as ordinary income rather than as capital gain.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) [As amended by Section 151 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * * or * * * real property used in the trade or business of the taxpayer;

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The pertinent facts as found by the District Court may be stated as follows:

Taxpayer, Beverly B. Bistline, a resident of Pocatello, Idaho, filed timely income tax returns for the years 1947 and 1948 and reported thereon the profit realized from the sale of certain real estate as long term capital gains. After investigation the Commissioner of Internal Revenue determined that these profits were taxable as ordinary income and accordingly assessed and collected additional income taxes for these years. (R. 26-27.)

On July 1, 1947, the taxpayer's parents transferred approximately 200 lots of improved and unimproved real estate in and near the City of Poca-

tello, Idaho, to her by means of two deeds of gift. At the time of transfer taxpayer was 24 years of age and employed as the business manager of the Pocatello Transit Company, one of her father's business enterprises. (R. 27.)

Soon after receipt of these properties, taxpayer began to sell them. The first sale occurred on August 5, 1947. During 1947 she sold five lots and realized a net profit of $2950. During 1948 she sold 123½ lots in four separate transactions for a net profit of $19,148.75. (R. 22, 27.)

Taxpayer's father, F. M. Bistline, negotiated the sale of all these properties subject to her counsel and consent. Along with his practice of law and management of sundry business enterprises, F. M. Bistline was engaged in the selling, dealing in and with real estate during the years 1947 and 1948. (R. 27.)

After taxpayer received this real estate from the parents, she was frequently and continuously engaged in the negotiation and/or consummation of the sale of her properties. (R. 27-28.)

The frequency, continuity and substantiality of the real estate sales transactions constituted a "business activity" within the general meaning and usage of that term. The real estate sold by taxpayer in 1947 and 1948 was held by her primarily for sale to customers in the ordinary course of her business, and was not held as an investment. (R. 28.)

The District Court accordingly held that the gain realized from such sales was taxable as ordinary income for federal income tax purposes. (R. 28).

SUMMARY OF ARGUMENT

On July 1, 1947, taxpayer received from her par-

ents by two deeds of gift 200 real estate lots in and near the city of Pocatello, Idaho. Almost immediately she began to dispose of this property, the first sale occurring within five weeks of acquisition. During an eleven-month period extending into 1948 taxpayer sold 128½ lots in seven transactions and realized a net gain therefrom of $22,098.75.

The question on appeal is whether the District Court correctly held this gain to be taxable as ordinary income derived from sales of property held primarily for sale to customers in the ordinary course of taxpayer's business. The question is one of fact and the District Court employed the tests for deciding the issue which have many times been approved by this Court. The evidence supports the court's holding.

Taxpayer's contention that the property was held for investment is refuted by her prompt sales and continued dealings in real estate extending beyond the tax years involved in conjunction with her father. The evidence clearly shows taxpayer held her property for sale.

Nor can taxpayer deny she was engaged in business because she was a "full-time" employee of her father's transit line and because the sales were handled through her father acting as her business agent. A taxpayer may have more than one business or occupation and this Court has many times held that a taxpayer cannot isolate himself from the actions of his agent.

Here taxpayer's agent, her father, was in the business of selling and dealing in real estate. He held the lots for sale in the course of business after he executed the deeds of gift as well as before execution.

Taxpayer accepted her father's business judgment and he utilized the proceeds from the sales as he best saw fit. No accounting has been rendered. A family corporation was formed in 1948 for the purpose of handling some of the family real estate business but the plans were never fully carried out. Thus, it is difficult if not impossible to consider taxpayer's real estate business apart from her father's business.

Taxpayer's gains were properly treated as ordinary income.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE REAL PROPERTY SOLD BY TAXPAYER IN 1947 AND 1948 WAS HELD PRIMARILY FOR SALE TO CUSTOMERS IN THE ORDINARY COURSE OF HER BUSINESS.

Taxpayer appeals from a judgment of the District Court holding that the gain realized by her from sale of real estate in 1947 and 1948, acquired from her parents by gift in July, 1947, was taxable as ordinary income rather than capital gain.

The pertinent statutory provision, Section 117 of the 1939 Code, *supra*, which defines capital assets, excludes "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business * * *." If the property which a taxpayer sells is held primarily for sale in the ordinary course of his business, the gain realized on the sale is to be taxed as ordinary income.

A. *Criteria used in deciding the issue*

Whether or not the present taxpayer's property

Taxpayer asserts that two special situations are present in the instant case. "One had to do with a parent conveying property to a child, and the other has to do with a parent giving counsel and advice and assisting in handling sales." (Br. 9.)

Apparently, taxpayer seeks to establish from the nature of the acquisition the premise that the properties were held for investment. She avers that her father so held them prior to gift (Br. 12), and cites *Sparks* v. *United States*, 55 F. Supp. 941 (M.D. Ga.). There a parent who held land for investment transferred it by gift to his son who two years later made some improvements and sold a portion to liquidate a debt. The profit realized was taxed as capital gain. The difficulty with taxpayer's contention and case authority is that they do not accord with the facts at hand. The court below found taxpayer's father was engaged in the real estate business. (R. 27.) Cf. *Bistline* v. *United States*, 145 F. Supp. 802 (Idaho), on appeal to this Court. Thus, before deeding these various properties to his daughter, Mr. Bistline was holding them for sale to customers. After he deeded them to taxpayer he still held these properties for sale, as will be demonstrated, with the single difference that he was then acting as her agent. Taxpayer made her first sale within five weeks of acquisition. 1/ Thus, the holding was for sale, not investment.

Furthermore, the purpose or reason for acquisition is not considered as important as the purpose for which the property is being held just prior to sale. *Richards* v. *Commissioner*, 81 F. 2d 369, 372-373 (C.A. 9th); *Rollingword Corp* v. *Commissioner*,

---

1/ Indeed, as to one property sales negotiations were completed before the property was even deeded to taxpayer.

supra, p. 266; *Mauldin* v. *Commissioner*, 195 F. 2d 714, 717 (C.A. 10th); *Friend* v. *Commissioner*, 198 F. 2d 285, 288 (C.A. 10th).

Next, taxpayer cites *Gruy* v. *Commissioner*, decided August 29, 1949 (1949 P-H T.C. Memorandum Decisions, par. 49,217), and *Storrow* v. *United States*, 99 F. Supp. 672 (S.D. Cal.). In *Gruy* taxpayers inherited property from their mother. While in schools or military service some sales were made for them by their father without solicitation. He was not in the real estate business. In *Storrow* an ill woman made three sales of inherited property which she had owned for 22 years through a bank as trustee—the first, a sale of lots in bulk, the second, a restaurant building and the third, 11.44 acres of land.

Taxpayer says she was a full time employee of the transit company. Here, however, as we have pointed out, her father, who was her business agent, was in the real estate business, and taxpayer cannot isolate herself from the activities of her parent in her behalf. It was stated in *Welch* v. *Solomon*, 99 F. 2d 41, 43 (C.A. 9th):

> The personal attention which a taxpayer gives to a business is certainly not decisive as to whether a resulting profit is ordinary income or capital gain. One may conduct a business through others, his agents, representatives, or employers. The business is nonetheless his because he chooses to let others bear all of the burdens of management.

There the business was operated by a trust, the income of which was currently distributable. In

Richards, supra, Boeing, supra, and *Ehrman, supra,* the business was carried on through agents. A taxpayer may have more than one occupation or business. *Friend* v. *Commissioner,* 198 F. 2d 285 (C.A. 10th), and *Fackler* v. *Commissioner,* 133 F. 2d 509 (C.A. 6th).

Nor was taxpayer's position totally passive. In consultation with her father as business agent (R. 47), the court found she was "frequently and continuously engaged in the negotiation and/or consummation of the sale of her properties." (R. 27-28.)

But, as suggested above, the frequency and continuity of transactions and business activities need not be judged on taxpayer's actions alone. There is no dispute that Mr. Bistline handled all of his daughter's real estate transactions as taxpayer's business agent. He was in the real estate business. Taxpayer never failed to follow her father's counsel. (R. 50, 62.) As we have pointed out, before the deeds of gift the father held the property for sale in his real estate business. Afterwards he still held them for sale as taxpayer's agent. The Bise Corporation was described as a family undertaking (R. 51, 60), and the pronoun "we" appears repeatedly (R. 60-62, 70). Taxpayer's father handled the proceeds from the sales as he best saw fit. He has never given taxpayer an accounting (R. 68-69.)

The family relationship reflected by the record, giving effect to taxpayer's interest, is one in the nature of agency. A similar relationship obtained between husband and wife in *Shepherd* v. *United States,* 139 F. Supp. 508 (E.D. Tenn.), affirmed *per curiam,* 231 F. 2d 445 (C.A. 6th), where the court held the profits realized from a husband's sale of his

wife's property to be taxed as ordinary income to her. Mr. Shepherd was and had been in the real estate business for many years. In 1932 he transferred most of his unimproved property to his wife. In 1948 Mr. Shepherd sold four of these properties. It was established that Mrs. Shepherd (pp. 512-513) "was a housewife, holds no real estate license, made no improvements to the vacant lots which she held, [and] conducted no active advertisement or solicitation for sales * * *." It also appeared that she had no (p. 512) "connection with her husband's agency in selling or dealing in property except that which belonged to her." The court found, however, that (p. 512):

> * * *as to the property which she did own the facts show the existence of the principal and agent relationship between herself as principal and her husband and members of his agency as her agents, for without exception the members of that agency handled her sales and received substantial benefits therefrom in the form of occasional commissions to individual salesmen and in the form of income to which its owner, Mr. Shepherd, had unlimited access "for use in his business or whatever was needed."
>
> [Accordingly] Despite the relatively small number of sales the whole case indicates throughout that Mrs. Shepherd's property was looked upon and dealt with not as investment property but as a means for producing a relatively constant and substantial income "for her private estate."

To repeat, the relationship found to exist here requires the business to be judged not merely by tax-

payer's activities alone but also in the light of those carried on by her father in her behalf with the result that the profits realized from the sales of her real estate must be taxed as ordinary income, just as the court held in the *Shepherd* case, *supra*. Cf. *Sommers* v. *Commissioner*, 195 F. 2d 680 (C.A.2d).

Perhaps the contention taxpayer emphasizes most is that her real estate dealings were not large enough to be a business. But size is a relative thing. A business may be small as well as large. It is submitted that the activities and sales were appropriate to Pocatello. Taxpayer and her father were dealing in vacant lots. While there is some dispute in the record over the extent of the listings with the former Bistline Realty Company and advertising of Bistline properties (R. 58, 64-67), it was agreed by taxpayer, her father and Mr. Smith, that advertising was not too necessary or desirable a way to sell lots in Pocatello because of buyer demand and because of the compensation involved in that kind of real estate. (R. 52, 59-60, 63). Taxpayer realized an income of $22,098.75 in an eleven month period from the sale of 128½ lots in seven transactions. For a young lady, age 24, this would seem rather substantial business income.

Taxpayer was not "liquidating" her holdings. Sales commenced with her acquisition of the two hundred lots by gift and continued after the years in question. (R. 50-51.) In 1948 a family corporation was formed for real estate dealings, particularly contracts and mortgages. (R. 51, 61.) It did not become fully operational. (R. 60-61.) Taxpayer could not state how many lots she presently owned. (R. 51.) However, she subsequently estimated $36,000 in contracts and mortgages and $10,000 in real

estate. She said (R. 68):

> I arrive at the $10,000 valuation by estimating the present value of the number of lots that I have. I am not sure exactly how many. I made the estimate with the advice of my father. The real estate contracts were the result of real estate sales. The mortgages went to people who came in to borrow money. My father was acting as my advisor to make investments for me and as such money was available to my father for loans. Some of the $36,000 is in mortgages and some of it is in contracts. I wouldn't say that I have had many more mortgages than I have now. As a result of the real estate sales we have had money to invest in loans and other property and other investments.

In support of her position taxpayer has cited only three distinguishable trial court decisions which were not appealed by the Government. She then states (Br. 13):

> In our search of the cases we have noted that in each instance where the taxpayer has been allowed capital gain treatment on the sales of real estate the government has chosen not to appeal, *which would indicate that taxpayers should be allowed the relief granted them by the law with regard to long term capital gain in cases such as the one here.* (Italics supplied.)

We suggest a more accurate conclusion to draw from taxpayer's observation would be that the failure to seek appellate review in many instances represents a recognition of the proper weight to be given

the judgment of the trier of the fact, noted earlier herein. 2/

In *Rollingwood* v. *Commissioner*, *supra*, this Court pointed out that most of the cases dealing with the problem of whether property is held primarily for sale to customers in the ordinary course of trade or business involve situations where the taxpayer is engaged in some activity apart from his usual occupation and the question is whether this activity amounts to a business. In considering that question in connection with the facts involved there, this Court then stated (pp. 266-267):

> The capital gains provisions are remedial provisions. Congress intended to alleviate the burden on a taxpayer whose property has increased in value over a long period of time from having the profits from sales taxed at graduated tax rates designed for a single year's income. The purpose is to protect "investment property" as distinguished from "stock in trade," or property bought and sold for a profit. It is our view that this policy was not meant to apply to a situation where one of the essential purposes in holding the property is *sale*.

The District Court concluded taxpayer had failed to carry her burden of proving that the properties sold in 1947 and 1948 were held primarily for investment rather than primarly for sale. Such conclusion is not erroneous.

2/ The Government has, of course, appealed cases involving this issue when it believes a proper basis for appellate review exists. Welch v. Solomon, 99 F. 2d 41 (C.A. 9th), and Commissioner v. Boeing, 106 F. 2d 305 (C.A. 9th), are examples of such appeals.

CONCLUSION

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,

ROBERT N. ANDERSON,

THOMAS N. CHAMBERS,
Attorneys,
Department of Justice,
Washington 25, *D. C.*

BEN PETERSON,
United States Attorney.

FEBRUARY, 1958.

No. 15716

United States
Court of Appeals
for the Ninth Circuit

BEVERLY B. BISTLINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Eastern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—12-6-57

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

F. M. BISTLINE,
R. DON BISTLINE,
Pocatello, Idaho,

Attorneys for Appellant.

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LEE A. JACKSON,
Attorney, Department of Justice,
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BEN PETERSON,
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Boise, Idaho,

Attorneys for Appellee.

In the District Court of the United States of America for the District of Idaho, Eastern Division

No. 1884

BEVERLY B. BISTLINE & A. R. SPAULDING,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

For cause of action against the defendant, plaintiff alleges:

I.

This action arises under the Internal Revenue Laws of the United States of America and more particularly the provisions thereof authorizing actions for the recovery of income tax unlawfully collected.

II.

That at all times hereinafter mentioned, the defendant, United States of America, was, and now is, a corporation sovereign and a body politic.

III.

That plaintiff was during all of the year 1947 a single person.

IV.

That on or before the 15th day of March, 1948, plaintiff herein, filed an income tax return on Form

1040 for the year 1947 in the office of the Collector of Internal Revenue for the District of Idaho, showing among other things, that in the calendar year 1947 she disposed of certain capital assets held for more than six months, which were reported in Schedule D of said return in words and figures as follows:

1. Kind of Property	2. Date Acquired	3. Date Sold	4. Sale Price	5. Cost	6. EOS & COI	7. Dep.	8. Gain
Vacant Lots S½ 9 and 10, Block 274, Pocatello	1939	9-27-47	$1,000	$150	.....	.....	$ 850.00
Vacant Lots, L. 15 and 16, Block 356..	1937	2- 5 -47	1,500	100	.....	.....	1,400.00
Vacant Lots, Lot 17 and S½ 18, Block 519, Pocatello	1936	7-15-45	1,000	300	.....	.....	700.00

V.

That plaintiff had a total profit on the sale of said capital assets of $2,950.00, from which she realized a long term capital gain in the amount of 50% thereof to wit, $1,475.00, which was included in plaintiff's net return for the year 1947 and all lawful taxes thereon were duly paid.

VI.

That the Commissioner of Internal Revenue erroneously ruled that said sum of $2,950.00 was not a capital gain, but resulted from the disposal of property held by the plaintiff primarily for sale to customers in the ordinary course of her trade or business.

VII.

That thereupon the Commissioner assessed an additional tax against plaintiff in the sum of $396.54, same being the amount of additional tax for which plaintiff was liable if all of said sum of $2,950.00 was taxable as ordinary income.

VIII.

That thereafter on June 22, 1951, plaintiff paid said defendant said assessment of $396.54, and lawful interest thereon from March 15, 1948, to May 31, 1951, in the amount of $71.47 and a 5% penalty in the sum of $19.80 making a total of $487.81, paid by plaintiff to the defendant as a result of said erroneous ruling of said commissioner of Internal Revenue.

IX.

That on March 4, 1952, plaintiff duly filed a claim for said refund of said additional tax and interest, a copy of which said claim is hereto annexed and marked "Exhibit A" and by reference made a part hereof. That said claim for refund was disallowed on April 8, 1953, and notice thereof received by plaintiff by registered mail on April 11, 1953.

X.

Plaintiff alleges that said gain of $2,950 was realized from the sale of her capital assets held more than six months and that she has been unlawfully denied the right accorded by the Statutes in such cases made and provided to pay her income tax on

one-half of said gain, to wit: $1,475.00, and that by reason thereof the defendant owes this plaintiff $487.41 for money had and received from the plaintiff on June 22, 1951, together with interest thereon at the rate of 6% per annum from June 22, 1951.

For a Second Cause of Action Against Defendant, Plaintiff Alleges:

I.

This action arises under the Internal Revenue Laws of the United States of America and more particularly the provisions thereof authorizing actions for the recovery of income tax unlawfully collected.

II.

That at all times hereinafter mentioned defendant, United States of America, was, and now is, a corporation sovereign and a body politic.

III.

That on June 28, 1948, plaintiff and A. R. Spaulding were married and continued to be husband and wife throughout the remainder of the year 1948, and until on or about September 15, 1949, at which time said marriage was dissolved by decree of divorce; that for the year 1948, plaintiff and her then husband, A. R. Spaulding, filed a joint income tax return on form 1040; that the assets hereinafter mentioned as being sold by plaintiff during said year 1948 were at the time of the sale thereof the separate property of plaintiff and the gain thereon

was her separate property, and that any income tax to which she may be entitled by way of refund is her separate property; that said A. R. Spaulding has assigned over to plaintiff any and all right to claim for refund of the taxes paid on the gain on the sale of said assets.

IV.

That on or before the 15th day of March, 1949, plaintiff herein filed an income tax return on form 1040 for year 1948 in the office of the Collector of Internal Revenue for the District of Idaho, showing among other things, that in the calendar year 1948 she disposed of certain capital assets held for more than six months, which were reported in Schedule D of said return in words and figures as follows:

1. Kind of Property	2. Date Acquired	3. Date Sold	4. Sale Price	6. Cost	7. Exp. Sale	8. Gain
Vacant lots, Block 26, Block 44, Block 27 (except lot 17), and Lots 19 and 20, Block 21, Pocatello Townsite	1939 to 1943	5-20-48	$16,400.	$1,500.00	.....	$14,900.00
Lots ½ 6 and 7, Block 52	1943	6-17-48	750.	150.00	$50.00	550.00
Lots 4-17, incl.; Block 2, Lots 1 and 3; Block 3, Lots 5, 6, 7, 10, and 13-19, incl.; Block 54; all of Block 6, Pocatello Townsite	1939	5-20-48	1,900.	200.00	.....	1,800.00
Lots 11-14, incl., Block 50	1940	1948	2,100.	201.75	.....	1,898.75
						$19,148.75

V.

That plaintiff had a total profit on the sale of said capital assets of $19,148.75 from which she realized a long term capital gain in the amount of 50% thereof, to wit: $9,574.37 which was included in plaintiff's net return for the year 1947 and all lawful taxes thereon were duly paid.

VI.

That the Commissioner of Internal Revenue erroneously ruled that said sum of $19,148.75 was not a capital gain, but resulted from the disposal of property held by the plaintiff primarily for sale to customers in the ordinary course of her trade or business.

VII.

That thereupon the Commissioner assessed an additional tax against plaintiff in the sum of $2,787.42 same being the amount of additional tax for which plaintiff was liable if all of said sum of $19,147.75 was taxable as ordinary income.

VIII.

That thereafter on June 22, 1951, plaintiff paid said defendant said assessment of $2,787.42 and lawful interest thereon from March 15, 1949, in the amount of $334.39 and a 5% penalty of $139.45 making a total of $3,261.26 paid by plaintiff to the defendant as a result of said erroneous ruling of said Commissioner of Internal Revenue.

IX.

That on March 4, 1952, plaintiff duly filed a claim for said refund of said additional tax and interest,

a copy of which said claim is hereto annexed and marked "Exhibit B" and by reference made a part hereof. That said claim for refund was disallowed on April 8, 1953, and notice thereof received by plaintiff by registered mail on April 11, 1953.

X.

Plaintiff alleges that said gain of $19,147.75 was realized from the sale of capital assets held more than six months and that she has been unlawfully denied the right accorded by the Statutes in such cases made and provided to pay her income tax on one-half of said gain, to wit: $9,574.37, and that by reason thereof the defendant owes this plaintiff the sum of $3,621.86 for money had and received from the plaintiff on June 22, 1951, together with interest thereon at the rate of six per cent per annum from June 22, 1951.

Wherefore, plaintiff prays judgment on her first cause of action for the sum of $487.41 together with interest thereon at the rate of 6% per annum from June 22, 1951, and on her second cause of action for the sum of $3,621.86 together with interest thereon at the rate of 6% per annum from June 22, 1951, and such other and further relief as may be proper in the premises and costs.

BISTLINE & BISTLINE,
Attorneys for Plaintiff;

By /s/ F. M. BISTLINE,
Residing at Pocatello, Idaho.

EXHIBIT A

Form 843
U. S. Treasury Department
Internal Revenue Service

Claim

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form

Refund of Taxes Illegally, Erroneously, or Excessively Collected

Collector's Stamp (Date received): [Blank.]

State of Idaho,
County of Bannock—ss.

Name of taxpayer or purchaser of stamps: Beverly B. Bistline.
Street address: Rooms 204-208 Dietrich Building, Pocatello, Idaho.
City, postal zone number, and State: 351 North Garfield Avenue, Pocatello, Idaho.

1. District in which return (if any) was filed: Idaho.

* * *

3. Kind of tax: Income tax for year 1947.
4. Amount of assessment: $1,533.65; dates of payment: 3-15-48, 5-31-51.

* * *

6. Amount to be refunded: $396.54.

* * *

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code, on May 31, 1953.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxable Net Income for year 1947 on which claimant paid tax per Form 1302, Sched. 2 attached to Rev. Agent. Report (Lloyd T. Ralphs) dated February 21, 1950 ..... $6,847.89

Less capital gains from sales of real estate held by taxpayers for more than 6 months, treated as ordinary income on R.A.R. 2-21-50		1,475.00
Credited Income		$5,372.89
Income Tax Paid	$1,533.65	
Income Tax as Same Should be Corrected	1,137.11	
Amount to be Refunded	$ 396.54	

Reasons: See attached sheet.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: February, 1952.

/s/ BEVERLY B. BISTLINE.

Reasons: The sales which the Revenue Agent set up as Ordinary Gain consisted of vacant lots in Pocatello, Idaho, which taxpayer had acquired from her parents as a gift. Taxpayer during all of the year 1947 was in the Waves till June 1, and thereafter was employed in the capacity of Cashier and Office Manager of the Pocatello Transit Company at Pocatello, and was in no way engaged in the real estate business. She was not licensed, had no office, did not advertise, and did nothing toward making them marketable, just held them. No special effort was made by anyone to sell them—they were sold to buyers who searched out the lots and the owner.

Said Property Was Not Held by Taxpayer for Sale to Customers in the Ordinary Course of Her Trade or Business.

I hereby declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ BEVERLY B. BISTLINE.

EXHIBIT B

Form 843
U. S. Treasury Department
Internal Revenue Service

Claim

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form

Refund of Taxes Illegally, Erroneously, or Excessively Collected

Collector's Stamp (Date received): [Blank.]

State of Idaho,
County of Bannock—ss.

Name of taxpayer or purchaser of stamps: Beverly B. Bistline. Business address: 204-208 Dietrich Building, Pocatello, Idaho. Residence: 351 North Garfield, Pocatello, Idaho.

1. District in which return (if any) was filed: Idaho.

* * *

3. Character of assessment or tax: Income tax for year 1948.
4. Amount of assessment: $5,171.60; dates of payment: 4-11-48 and 6-27-51.

* * *

6. Amount to be refunded: $2,787.42.

* * *

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code, on 6-27-53.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxable Net Income for the year 1948 on which claimant and her then husband, A. R. Spaulding, paid tax per Form 1302, Sched. 2 attached to Rev. Agent Report (Walter H. Wilson) April 4, 1950.....	$21,690.22
Less capital gains from sales of real estate held by taxpayer, Beverly B. Bistline, for more than six months, treated as ordinary income on R.A.R. April 5, 1940	9,574.37
Income tax paid	$5,171.60
As same should be corrected	2,384.18
Amount to Be Refunded	$2,787.42

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: .....,19.....

/s/ BEVERLY B. BISTLINE.

Reasons: The sales which the Revenue Agent set up as

Ordinary Gain consisted of vacant lots in Pocatello, Idaho, which taxpayer had acquired from her parents as a gift. Taxpayer during all of the year 1948, was employed in the capacity of Cashier and Office Manager of the Pocatello Transit Company at Pocatello, and was in no way engaged in the real estate business. She was not licensed, maintained no office, did not advertise the lots for sale, and did nothing toward making them marketable—just held

them. No special effort was made by anyone to sell them, they were sold to buyers who came to taxpayer to purchase them and kept after her till a sale was made.

In the case of the Lots in Blocks 26, 27 and 44—Taxpayer was in Knoxville, Tennessee, when a call was received over the telephone asking if they could be purchased; that certain interests had taken an option on ground in adjacent Alameda and that the Mayor and Chamber of Commerce wanted to get the property into Pocatello, and asked taxpayer to hold them until they could negotiate with her for their sale. Sale was made under the circumstances of the upbuilding of the community and not in ordinary circumstances. Said Property Was Not Held by Taxpayer for Sale to Customers in the Ordinary Course of Her Trade or Business at Any Time.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

MOTION TO ADD PARTY

Now comes the defendant, United States of America, by its attorney, Sherman F. Furey, Jr., United States Attorney for the District of Idaho, and moves the Court, pursuant to Rule 19(a) of the Rules of Civil Procedure, to join A. R. Spaulding, 211 North 8th, Boise, Idaho, as a party plaintiff to this action.

This motion is made for the reason that this action is brought by the plaintiff, Beverly B. Bistline,

for a refund of income taxes, penalty and interest paid for the year 1948; that Beverly B. Bistline and A. R. Spaulding filed a joint income tax return for 1948 as husband and wife and, their liability for income tax for 1948 being joint, they should both be parties plaintiff to this action to avoid the possibility of more than one action for the taxes herein sued for.

/s/ JOHN T. HAWLEY,
Asst. United States Attorney.

[Endorsed]: Filed May 9, 1955.

[Title of District Court and Cause.]

ORDER

The Motion to Add Party, heretofore filed by the defendant United States of America, having come on for hearing and good cause appearing for the granting of the relief therein prayed;

It Is, Therefore, Ordered that A. R. Spaulding, 211 North 8th, Boise, Idaho, be made a party plaintiff in this action.

Dated this 18th day of May, 1955.

/s/ FRED M. TAYLOR,
Judge, U. S. District Court.

[Endorsed]: Filed May 18, 1955.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Bistline & Bistline, plaintiff's attorneys, whose address 616 E. Clark, Pocatello, Idaho, (P. O. Box 8), an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] /s/ ED. M. BRYAN,
Clerk of Court.

By /s/ ARTHUR G. OLSEN,
Deputy Clerk.

Date: March 9, 1955.

Note—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return on Service of Writ

I hereby certify and return, that on the 10th day of March, 1955, I received the within summons and on the 10th day of March, 1955, executed same by serving a true and correct copy on Sherman F. Furey, Jr., U. S. Attorney for Idaho, and by mail-

ing two copies via registered mail to the Attorney General, Washington, D. C.

SAUL H. CLARK,
United States Marshal.

Marshal's Fees

Travel .....$ none
Service 2.00

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

ANSWER

The defendant by its attorney, Sherman F. Furey, Jr., United States Attorney for the District of Idaho, answers the plaintiff's complaint as follows:

1. The defendant denies the allegations contained in paragraph I, except to admit that this action has been brought under the Internal Revenue Laws of the United States of America for the recovery of income taxes lawfully assessed and collected from the plaintiff.

2. The defendant admits the allegations of paragraph II.

3. The defendant admits the allegations of paragraph III.

4. The defendant denies the allegations contained in paragraph IV except to admit that plaintiff filed

an individual income tax return, form 1040, for the year 1947, with the Collector of Internal Revenue for the District of Idaho, on March 15, 1948, and to further admit that the said return reported the sale of certain real estate described in paragraph IV.

5. The defendant denies the allegations contained in paragraph V.

6. Defendant denies the allegations contained in paragraph VI, except to admit that the Commissioner of Internal Revenue determined that income received by plaintiff during the year 1947 from the sale of certain real estate was not taxable as a capital gain as reported by plaintiff on her 1947 individual income tax return, but that the said income was taxable as ordinary income.

7. The defendant denies the allegations contained in paragraph VII except to admit that plaintiff was assessed a deficiency in income taxes for the year 1947 in the amount of $92.73 which amount was duly paid together with interest thereon in the amount of $16.75 on or about about May 24, 1951.

8. At the present time the defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph VIII.

9. The defendant denies the allegations contained in paragraph IX except to admit that plaintiff filed a claim for refund of income taxes for the year 1947 on or about March 3, 1952, and that said claim for refund was disallowed on April 8, 1953. Defendant further denies each and every allegation contained in

said claim for refund which is not otherwise expressly admitted in this answer.

10. The defendant denies each and every allegation contained in paragraph X.

Defendant Answers the Second Cause of Action Alleged by the Plaintiff as Follows:

1. The defendant denies the allegations contained in paragraph I, except to admit that this action has been brought under the Internal Revenue Laws of the United States of America for the recovery of income taxes lawfully assessed and collected from the plaintiff.

2. The defendant admits the allegations of paragraph II.

3. The defendant denies each and every allegation contained in paragraph III, except to admit plaintiff and her then husband, A. R. Spaulding, filed a joint individual income tax return, Form 1040, for the year 1948, with the Collector of Internal Revenue, District of Idaho, on or about April 11, 1949.

4. The defendant denies each and every allegation contained in paragraph IV except to admit that on or about April 11, 1949, the plaintiff filed a federal income tax return, Form 1040, for the year 1948 with the Collector of Internal Revenue for the District of Idaho.

5. The defendant denies each and every allegation contained in paragraph V.

6. The defendant denies the allegations contained in paragraph VI, except to admit that the Commissioner of Internal Revenue determined that income received by plaintiff from the sale of certain real estate during the year 1948 was not taxable as capital gain but was taxable as ordinary income for that year.

7. The defendant denies the allegations contained in paragraph VII except to admit that plaintiff and her then husband were assessed a deficiency of $3,864.34 in federal income taxes for the year 1948.

8. At the present time the defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph VIII, except that it is denied that any of the Commissioner's rulings were erroneous.

9. The defendant denies the allegations contained in paragraph IX except to admit that on or about March 3, 1952, plaintiff filed a claim for refund of income taxes for 1948, with the Collector of Internal Revenue for the District of Idaho, and that said claim for refund was disallowed on April 8, 1953. Defendant further denies each and every allegation contained in the aforesaid claim for refund which is not otherwise expressly admitted in this answer.

10. The defendant denies each and every allegation contained in paragraph X.

Wherefore, the defendant having answered prays that judgment be entered dismissing the plaintiff's complaint with prejudice, and that the defendant be

awarded its costs and other relief which to the court may seem just and proper.

/s/ JOHN T. HAWLEY,
Asst. United States Attorney.

[Endorsed]: Filed May 9, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

The plaintiff brings this suit against the United States to recover income taxes alleged to have been erroneously assessed and collected. Pursuant to a motion by the United States an order was entered naming A. R. Spaulding, plaintiff's former husband, a party plaintiff; Spaulding, however, made no appearance in this action.

This Court's jurisdiction is based on 28 U.S.C.A. § 1346 (a) (1).

The issue in this case is whether profits realized by the taxpayer from the sale of real estate in the years 1947 and 1948 were properly taxed as ordinary income. The determination of this question depends upon whether the property sold was capital assets within the meaning of § 117 of the Internal Revenue Code of 1939, 26 U.S.C.A. §117, or whether it was excluded as constituting "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

On July 1, 1947, the taxpayer's parents transferred approximately 200 lots of improved and unimproved real estate in and near the city of Pocatello, Idaho, to her by means of two gift deeds. The taxpayer, 24 years of age at the time the deeds were executed, was employed as the business manager of the Pocatello Transit Company, one of her father's business enterprises, which owned and operated buses in Pocatello. One of the said deeds was filed for record on July 15, 1947; the other was recorded on August 13, 1947.

The taxpayer immediately began to dispose of this property. She sold two lots on August 5, 1947. Later in the year, in two separate sales, she sold three more lots. Her net gain on all these sales amounted to $2,950. She reported a long-term capital gain of $1,475, and paid taxes on the same for the year 1947. Four sales were consummated in 1948, in which the taxpayer disposed of a total of 103 ½ lots, plus all of Block 6 in Pocatello, Idaho, for a net gain of $19,148.75. She treated this sum as a long-term capital gain, and paid taxes on fifty per cent of the same, or $9,574.37.

The Internal Revenue Service determined that the property involved in the said sales in 1947 and 1948 had been held primarily for a sale to customers in the ordinary course of the taxpayer's business, and assessed additional taxes in the amount of $396.54 for the year 1947, and $2,787.42 for the year 1948. After protest, denial thereof and payment of the taxes as assessed, and the filing of claims for refund

and the denial of the same, the taxpayer filed this action.

Property held by a taxpayer primarily for sale to customers in the ordinary course of his trade or business is expressly excluded from the statutory definition of capital assets. Section 117 (a) (1), Internal Revenue Code of 1939, 26 U.S.C.A. § 117 (a) (1). Whether property sold by a taxpayer comes within the scope of this exception is essentially a question of fact to be determined from the facts of each case. Stockton Harbor Industrial Company vs. Commissioner, 9 Cir., 216 F. 2d 638, 650 certiorari denied 349 U.S. 904, 75 S.Ct. 581, 99 L.Ed. 1241; Cohn vs. Commissioner, 9 Cir., 226 F. 2d 22, 24.

The Court of Appeals for the Ninth Circuit has declared that the facts necessary to create the status of one engaged in a "trade or business" revolve largely around the frequency or continuity of the transactions claimed to result in a "business" status. Ehrman vs. Commissioner, 9 Cir., 120 F. 2d 607, 610. In Rollingwood Corporation vs. Commissioner, 9 Cir., 190 F. 2d 263, the Court of Appeals stated, at 266, as follows:

> "While the purpose for which the property was acquired is of some weight the ultimate question is the purpose for which the property is held. Richards vs. C. I. R., 9 Cir., 81 F. 2d 369, 106 A.L.R. 249. Most of the cases dealing with the problem of whether property is held primarily for sale to customers in the ordinary

> course of trade or business involve situations where the taxpayer is engaged in some activity apart from his usual occupation and the question is whether this activity amounts to a business. The test normally applied in these situations is the frequency and continuity of the transactions claimed to result in a trade or business. Applying that test to the facts of the instant case we have no difficulty in finding support in the record for the finding that Rollingwood is in the business of selling real property." (Emphasis added.)

See, also: Palos Verdes Corp. vs. United States, 9 Cir., 201 F. 2d 256, 258-259; Stockton Harbor Industrial Company vs. Commissioner, supra.

When the standard provided by the Ehrman case is applied to the facts in the case at bar, it is clear that the taxpayer was in the business of selling real property. She made her first sale approximately five weeks after receiving the gift deeds from her parents, participated in seven real estate transactions during an eleven-month period, and sold a total of 108 ½ lots, as well as an entire city block, for a net gain of $22,098.75. This property was not capital assets within the meaning of § 117 of the Internal Revenue Code of 1939, 26 U.S.C.A. § 117, and the Internal Revenue Service correctly treated the gains from the said sales as ordinary income.

> "The capital gains provisions are remedial provisions. Congress intended to alleviate the

> burden on a taxpayer whose property has increased in value over a long period of time from having the profits from sales taxed at graduated tax rates designed for a single year's income. The purpose is to protect 'investment property' as distinguished from 'stock in trade,' or property bought and sold for a profit. It is our view that this policy was not meant to apply to a situation where one of the essential purposes in holding the property is sale." Rollingwood Corporation vs. Commissioner, supra.

The taxpayer has the burden of proving that the particular properties sold during 1947 and 1948 were held primarily for investment rather than primarily for sale. Cohn vs. Commissioner, supra. She has not met that burden. The recovery sought is, therefore, denied.

Counsel for defendant may prepare findings of fact, conclusions of law and a proposed judgment, serve copies thereof upon counsel for the plaintiff and submit originals to the Court for its approval.

Dated this 1st day of November, 1956.

/s/ FRED M. TAYLOR,
United States District Judge.

[Endorsed]: Filed November 2, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried before the Court on May 3, 1956, at Pocatello, Idaho. F. M. Bistline and Beverly B. Bistline appearing as counsel for the plaintiff. Sherman F. Furey, Jr., United States District Attorney for the District of Idaho; Marion Callister, Assistant United States District Attorney for the District of Idaho, and Arthur L. Biggins, Attorney, Tax Division, Department of Justice, appearing as counsel for the defendant. Witnesses were sworn and testified, and documentary evidence was introduced on behalf of the respective parties. At the conclusion of the trial counsel waived oral argument, and upon agreement it was ordered that briefs be submitted to the Court. The Court having considered the evidence, briefs of counsel, and being fully advised in the premises, makes and files herein its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

1. Beverly B. Bistline is a resident of Pocatello, Idaho.

2. Beverly B. Bistline filed timely income tax returns for the years 1947 and 1948 and reported thereon the profit realized from the sale of certain real estate as long-term capital gains.

3. After review of plaintiff's income tax returns for 1947 and 1948, the Commissioner of Internal

Revenue determined that the profits realized from the sale of these properties was taxable as ordinary income for federal income tax purposes. He subsequently assessed and collected additional income taxes for 1947 in the amount of $396.54 and $2,787.42 for 1948.

4. On July 1, 1947, the parents of Beverly Bistline transferred approximately 200 lots of improved and unimproved real estate in and near the City of Pocatello, Idaho, to her by means of two gift deeds. These deeds were filed for record on July 15, 1947, and on August 13, 1947.

5. At the time of this transfer (July 1, 1947), Beverly Bistline was 24 years of age and employed as the business manager of the Pocatello Transit Company, one of her father's business enterprises.

6. Soon after receipt of these properties, Beverly Bistline began to sell the same, the first of which properties were sold on August 5, 1947. During 1947 she sold five lots for a net profit of $2,950. During 1948 she sold 123 ½ lots for a net profit of $19,148.75.

7. F. M. Bistline, the father of Beverly, negotiated the sale of all these properties subject to her counsel and consent. Along with his practice of law and management of sundry business enterprises, F. M. Bistline was engaged in the selling, dealing in and with real estate during the years 1947 and 1948.

8. After Beverly Bistline received this real estate from her parents, she was frequently and con-

tinuously engaged in the negotiation and/or consummation of the sale of her properties. That said real estate was held by plaintiff primarily for sale to customers, and was not being held as an investment.

9. Pursuant to a motion by the United States, A. R. Spaulding, the former husband of Beverly Bistline, was made a party plaintiff to this action. Spaulding made no appearance, however, in the trial of this action.

Conclusions of Law

1. The Court has jurisdiction of the parties to and subject matter of this action.

2. The frequency, continuity and substantiality of the real estate sales transactions constituted a "business activity" within the general meaning and usuage of said term.

3. The real estate sold by plaintiff during 1947 and 1948 was held by her primarily for sale to customers in the ordinary course of her business. The profits realized by the plaintiff from the sale of said properties were taxable as ordinary income for federal income tax purposes.

4. Plaintiff is not entitled to take and have anything by virtue of this action, and defendant is entitled to judgment accordingly.

/s/ FRED M. TAYLOR,
United States District Judge.

[Endorsed]: Filed April 18, 1957.

In the United States District Court for the District of Idaho

Civil No. 1884

BEVERLY B. BISTLINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

Plaintiff having appeared in person by her attorneys, F. M. Bistline and Don R. Bistline, and the defendant having appeared by Arthur L. Biggins, Attorney, Tax Division, Department of Justice, and the Court having considered the evidence presented, and the pleadings, stipulation and briefs filed,

It Is Hereby Ordered and Adjudged that this action be dismissed on the merits and the defendant allowed his costs.

Dated at Boise, Idaho, this 14th day of June, 1957.

/s/ FRED M. TAYLOR,
United States District Judge
for the District of Idaho.

Lodged April 5, 1957.

[Endorsed]: Filed June 14, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Beverly B. Bistline, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 14th day of June, 1957.

/s/ F. M. BISTLINE,

/s/ R. DON BISTLINE,
Attorneys for Appellant,
Beverly B. Bistline.

[Endorsed]: Filed August 9, 1957.

In the District Court of the United States for the District of Idaho, Eastern Division

Civil Case No. 1884

BEVERLY B. BISTLINE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

NARRATIVE STATEMENT OF TESTIMONY AND PROCEEDINGS

The above-entitled cause came on regularly for trial on the 3d day of May, 1956, upon the issues framed by plaintiff's complaint and defendant's an-

swer thereto, R. Don Bistline and F. M. Bistline appearing as counsel for plaintiff-appellant and Arthur L. Biggins, appearing as counsel for respondent.

Stipulations

Mr. Bistline: It is hereby stipulated by and between counsel for the respective parties that the following statement is a true, correct and accurate statement of the facts therein stated:

"I.

"F. M. Bistline and Anne Bistline, husband and wife, and father and mother of the plaintiff, Beverly B. Bistline, executed to said Beverly B. Bistline two gift deeds dated July 1, 1947. One of these deeds was recorded in Book 100 of Deeds at page 226 of the Records of Bannock County, Idaho. It was filed for record August 13, 1947, and conveyed the following described property:

Lots 4-17 inclusive in Block 2;
Lots 1 and 3 in Block 3;
Lots 5, 6, 7, 10 and 13-19 inclusive in Block 5;
All of Block 6 (20 Lots);
Lots 6-10 inclusive and 16 to 20 inclusive in Block 7;
Lots 1-7 inclusive, Block 8;
Lots 2, 3 and 5 in Block 9;
All of Block 11 (20 Lots);
Lots 3-8 inclusive and Lots 11-20 inclusive in Block 21;
All of Block 22 (20 Lots);

Lots 1 and 2 in Block 24;
Lots 1, 7, 8 and 17 in Block 25;
Lots 1-10 inclusive and 13-20 inclusive in Block 26;
All of Block 27 except Lot 17 (19 Lots); All in Pocatello Townsite.

"The other deed was filed for record July 15, 1947, and recorded in Book 100 of Deeds at page 149 of the records of Bannock County, Idaho, and conveyed the following described property:

All of Block 44 (20 Lots);
Lots 11 and 12 in Block 49;
Lots 11-14 inclusive in Block 50;
The Northeasterly One-Half of Lots 1, 2 and 3 in Block 51;
Lots 5, 6, 7 in Block 52;
Lots 5 and 6 in Block 74;
Lots 7 and 8 in Block 74;
Lots 8, 9 and 10 in Block 105;
Lots 13 and 14 in Block 339;
The North West Half of Lot 9 and all of Lot 10 in Block 274;
Lots 19 and 20 in Block 356;
Lots 1, 2 and 3 in Block 360;
Lots 13 and 14 in Block 380; [2*]
The Northwesterly 5 feet of Lot 17 and all of Lots 18, 19 and 20 in Block 467;
Lots 13 and 14 in Block 468;
Lots 7-18 inclusive in Block 494;

*Page numbering appearing at top of page of original Certified Transcript of Record.

Lot 17 and the Southwest Half of Lot 18 in Block 516; All in Pocatello Townsite, Bannock County, Idaho.

An undivided one-half interest in the Southwesterly 70 feet of Lots 11, 12, 13 and Southeasterly 20 feet by 70 feet of Lot 14 in Block 234 of Pocatello Townsite, on which was located a three-unit apartment, in Pocatello Townsite.

Lots 5, 6, 7 and 8 in Block 1 of Victory Park Townsite on which was located a duplex. This property is in Alameda, Bannock County, Idaho.

"II.

At the time the deeds were executed plaintiff was 24 years old and was employed as business manager of the Pocatello Transit Company, which owned and operated the transit buses in the City of Pocatello. This was full-time employment. Her occupation for five years immediately preceding this was that of student at the University of Idaho, from which she graduated in 1943. She took up the duties of business manager of the transit lines immediately on graduation. This employment was interrupted by military service in the Waves during World War II, from which she was discharged as of July 1, 1947. She immediately returned to Pocatello and resumed her duties as business manager of the Pocatello Transit Company.

"III.

During the year 1947, the following sales were made:

1. August 5, 1947: Lots 19 and 20 in Block 356 to Kenneth Draper for $1,500.00 and a net gain of $1,400.00. This was reported as a long-term capital gain of $700.00. This property was acquired by F. M. Bistline in 1937.

2. September 27, 1947: The South Half of Lot 9 and Lot 10 in Block 274 to Thomas J. Coates for $1,000.00 and a net gain of $850.00. This was reported as a long-term capital gain of $425.00. This property was acquired by F. M. Bistline in 1939.

3. ....., 1947: Lot 17 and South Half of Lot 18 in Block 519 to Albert Anderson for $1,000.00 and a net gain of $700.00 reported on long-term capital gain basis of $350.00. This was acquired by F. M. Bistline July 15, 1945.

"IV.

Plaintiff paid taxes for the year 1947, on $1,475.00 on the three sales mentioned above. In January, 1950, her books were examined by an Internal Revenue Agent, who determined that these transactions were taxable as income rather than ordinary long-term capital gains as reported, and required her to pay tax on an additional $1,475.00, holding the said property was held by her for sale to customers in the ordinary course of her trade in business. Plaintiff protested to the Commissioner, who denied [4] her protest. She then paid the tax on this item and claimed a refund, and the refund was denied by the Internal Revenue Bureau. The claim to refund is attached to plaintiff's complaint as Exhibit A, she

claimed therein that she was entitled to a refund of $396.54. This suit is for the recovery of this amount, plus interest thereon from the date of the payment and is the subject matter of her first cause of action.

"V.

During the year 1948 the following sales were made which are subject to the second cause of action:

1. January 12, 1948: Lots 11-14, inclusive, in Block 50 to H. A. Peterson for $2,100.00 for a net gain of $1,898.75, which was reported on the long-term capital gain basis in the amount of $949.47. This property was acquired by F. M. Bistline in 1940.

2. May 20, 1948, to Pocatello Heights, Inc., all of Block 26, 44, 27 (except Lot 17) and Lots 19 and 20 of Block 21, a total of 61 Lots for $16,400.00 and a net gain of $14,900.00, which was reported as a long-term capital gain of $7,450.00. This property was acquired by F. M. Bistline in 1939.

3. May 20, 1948: Lots 4-17, inclusive, of Block 2, Lots 1 and 3 of Block 3; Lots 5, 6, 7 and 10 and 13-19, inclusive, of Block 54, and all of Block 6 to Empire Investment Company (Smith-Marshall) for $1,900.00 and a net gain of $1,800.00 which was reported as a long-term capital gain of $900.00. This was acquired by F. M. Bistline in 1939. [5]

4. July 6, 1948: The South Half of Lot 6 and all of Lot 7 in Block 52 to Edward F. Brick, for a

net gain of $550.00, which was reported on the long-term capital gain basis in the amount of $275.00. This was acquired by F. M. Bistline in 1939.

"VI.

That the total amount of gain on the above transactions made in 1948 was $19,148.75. Plaintiff paid tax on 50 per cent of this amount as a long-term capital gain, in the amount of $9,574.37. On the examination of the 1948 return the Internal Revenue Agent held that plaintiff was engaged in real estate business and had held the property primarily for sale to customers in the ordinary course of her business, and after protest, denial thereof and payment of the taxes as assessed and the filing of the claim for refund and denial thereof, plaintiff brought this suit for the sum of $4,787.42, together with interest from the date of payment."

Does Counsel stipulate these facts?

Mr. Biggins: Counsel so stipulates.

The Court: Very well."

"Mr. Bistline: It is hereby stipulated that in the event that the plaintiff prevails on her first cause of action in her complaint that she is entitled to capital gain treatment and judgment thereon, that the plaintiff, Beverly B. Bistline, shall be entitled to judgment as prayed in her complaint if all the transactions are held to be capital gains or proportionately in case some are held not to be, subject to the correct mathematical [6] calculation thereof in accordance with the Revenue Laws of the United States pertaining thereto. It is further stipulated

that in the event the plaintiff, Beverly B. Bistline, and the additional plaintiff, A. R. Spaulding, prevail on the contention that the sales of the Beverly B. Bistline property set forth in her second cause of action are capital gains and entitled to capital gain treatment and judgment therein, that the plaintiffs, Beverly B. Bistline and A. R. Spaulding, should be entitled to judgment as prayed in the second cause of action if all transactions are held to be capital gains and proportionately if otherwise, subject, however, to the correct mathematical calculations thereon in accordance with the Revenue Laws of the United States pertaining thereto. Does counsel stipulate to that?

"Mr. Biggins: So stipulated."

PLAINTIFF'S CASE IN CHIEF

Examination

By F. M. Bistline:

(All witnesses were duly sworn before testifying.)

O. R. BAUM

witness for plaintiff, testified as follows:

I am an attorney at law and have been since 1912. I am familiar with the property on which the Pocatello Heights apartments now stand, same being Block 44, 26 and 27 of Pocatello Townsite. I inspected these Blocks in 1947 with J. R. Simplot and Mr. Ott Powers, the manager of the fertilizer division located at Pocatello and C. H. Elle, the con-

tractor, who later built the apartments. We visited a number of sites and this was among them.

The purpose of visiting these sites was because Mr. Simplot [7] advised me that he desired to build what they called a "608," that he had had some men out and they wanted a location in Pocatello, and he or Mr. Powers, I don't know which, was in the office and we got hold of Mr. Elle and I accompanied them on that trip. After looking at the sites we ascertained who were the owners of them and subsequently attempted to contact the owners. I thought you were the owner of these lots. It may have been Beverly, I don't know about that. I reported that the Bistline family owned them and I was directed to contact you. I found you were out of town, down in Tennessee somewhere, and I tried to locate you long distance. I called Knoxville and told them you might be with Mr. James P. Pope, who was head of the T. V. A., and later on that night, or the next day, or two, I did reach you long distance with regard to the purchase of these lots. I think I asked you if you wanted to sell them and what the price was. I recall you told me you were coming home, and you would contact me upon your return or words to that effect. On your return you contacted me and subsequently I believe Mr. Haight worked on that sale under my directions. I don't know if he was working for me at that time or whether he was in the Simplot office, but he was in one of the offices and he brought the title to me and I approved the title and subsequently purchased two additional lots that were in the middle of these lots from other parties for Mr. Simplot.

Cross-Examination

By Mr. Biggins:

I don't know the date. We were in New York about the 9th, Mr. [8] Simplot and I, and it was some time prior to the 9th of November. The 8th is approximately right. I talked to Mr. F. M. Bistline not his daughter. I know I chased him all over Tennessee trying to find him, but I don't think I had any occasion to talk to Beverly. I called F. M. Bistline. Knowing him as I did I naturally would talk to him, and when he came back he is the one that negotiated with me. He negotiated with Haight, and I think I ultimately closed the deal or the sale with Mr. Simplot. I do not know how the check was made out when the sale was closed. It was in his name, I wouldn't know. I wouldn't have any way of knowing. I couldn't say whether I saw Beverly during the course of the negotiations, at least I didn't talk to her. I saw her every day, but I don't know when. As to whether there was considerable dickering about the option price, I remember talking to Mr. Bistline and telling him that we had to have those other two lots, which were right in the middle of these lots Mr. Bistline had, and a man by the same name that lives in Pittsburgh or Philadelphia had them, and for some reason Mr. Bistline didn't want to or couldn't deal with him—I don't know, but I was directed by the Simplot organization to take it up with him and I talked to him on the phone. His son worked for this National Union and title or consent for title came through the Pacific

Supply Company which is affiliated with the National Union or something, and anyway it was a considerable number of months, I wouldn't say months, but considerable time before the deal was completed, and Mr. Simplot was here and in those days Westvaco was coming and was quite active, and I [9] wouldn't recall any particular dates.

Recross-Examination

By Mr. Bistline:

I probably mentioned something in a conversation with Mr. Bistline when he was in Tennessee that the Mayor or Chamber of Commerce was quite interested in getting this property into Pocatello rather than Alameda, but I wouldn't remember that. I remember after the news got out that Westvaco was interested in coming and I don't recall just what was said now. Like I say, I remember after the news got out that Westvaco was interested in coming and this apartment thing might be built, but I don't recall just what was said.

MRS. H. A. PETERSON

called as a witness, testified as follows:

Direct Examination

By Mr. Bistline:

I have lived at 1524 E. Lander in Pocatello since December 10, 1948. My husband is not living. He was in 1947 and 1948.

I do not know from whom we purchased certain

property in 1948—I think it was Mr. Marshall that made the sale to us, if I am correct. My husband took care of everything at that time. I remember looking at the lots. We lived in the neighborhood and had had our eye on them for a long time. After we concluded it might be well to buy them—it was on account of my son. He wanted to build and he was looking for lots and it seemed as though there were four lots in one. They wouldn't sell them separate and so he came over to Mr. Peterson and wanted to know if he would help him out. He didn't have the money to buy the lot, so Mr. Peterson helped him [10] out and bought the four lots and then we divided the lots up between him and us.

When we first looked at the lots we didn't know who owned them. We subsequently found out. I couldn't tell just how. It was between my son and my husband. They looked around and I know they asked "Hirschberger." Whether he told them who owned them or not I don't know. They subsequently found out the Bistlines owned them. Then my husband bought them. I don't know where he went to complete the sale. I think it was the Bistline Real Estate, or what was it down there on Main right across from the post office. Bistline Realty Company, I think Mr. Marshall was in with them at that time. The sale was subsequently concluded.

Cross-Examination

By Mr. Biggins:

I remember meeting Mr. Marshall several times. The occasion of meeting him is I just go there and take care of his children at times, that is all, but not at that time—since then. I couldn't tell you how I knew he was the man to see about the sale of this property, but I think it was him that was taking charge of it at the time. It was my understanding. I knew he worked for the Bistline Realty Company.

THOMAS J. COATES

called as a witness, testified as follows:

Direct Examination

By Mr. Bistline:

I live at 454 North 4th, Pocatello, and have lived there three years. I am janitor at the Union Pacific Railroad. I have been employed by the Union Pacific for 19 years.

During the year 1947 I inspected some lots on North 6th Avenue [11] with the view to buying them. I don't recall the description now, and at the time I was inspecting the lot I didn't know the number, but I do know it was on 6th and Bridger. I went to the Court House and found out. After I went to the Court House I got in contact with the owner and they sent us to F. M. Bistline and subsequently a contract was signed and the sale made. The contract price was $1,000 on monthly payments.

Mr. Biggins: No questions.

CLARICE MITCHELL

called as a witness, testified as follows:

I am the wife of James E. Mitchell of the Mitchell Radio and Appliances. I am employed as assistant auditor in the auditor and record's office at Bannock County. During 1947 I was familiar with the property which is now occupied by Pocatello Heights Apartments. We were looking around for some property to build us a new home and looked at that property. After looking it over we looked up the record in the assessor's office to see who owned it, and I remember of it being in the name of Bistline, and I approached F. M. Bistline one day and asked if he were going to develop that, that we were interested in getting off the east bench somewhere, and he said that he hadn't made up his mind, and I just let it go, and I remember approaching him several times on it in a matter of months or over a period of a year maybe and he still hadn't made up his mind as to what he was going to do with it, but he told me that if he did he would give us first chance at a location there. I subsequently bought a location in that area, when Smith-Marshall opened up College Terrace, we [12] bought a lot up there. In fact we were one of the first up there.

Mr. Biggins: No questions.

ALBERT ANDERSON

called as a witness, testified as follows:

I live at 1423 North Hayes in Pocatello and my occupation is carpenter. I have lived at that address

29 years. I bought a vacant lot from Mr. Bistline immediately north of my place. I happened to become interested in that lot because they were next door to me and I tried pretty near two years to get it and finally I got it. I first talked to F. M. Bistline about the lot about 15 years ago and it took pretty near two years before a sale could be made.

Mr. Biggins: No questions.

EDWARD F. BRICK

called as a witness, testified as follows:

I live at 131 North 15th and have since May, 1950. I bought the lot—lots from Beverly Bistline. I became interested in them in that I had been making a deal on some lots on the north or southeast corner of 15th and Clark near these lots and the deal fell through and I was talking to Mr. Marshall that same day and was telling him about it. I know him personally and he said he thought maybe he knew of some lots in that location and he would look into it, and I was quite interested so I followed it up and I contacted him, there at the office, and in the meantime he found out how much they were and he told me where they were located, and I had gone out and looked at them and there were the three lots there and it was more than I wanted so I arranged to have my father-in-law take a lot and a half and [13] I took a lot and a half, and the sale was ultimately completed.

Beverly Bistline never contacted me with regard to the lots. I never met her until here. After I talked to Mr. Marshall we closed the entire deal.

Cross-Examination

By Mr. Biggins:

Mr. Marshall was working or was connected with the Smith-Marshall Agency or Bistline Realty. I don't know what the name was then. It is on my contract. I closed the deal the date of July 6, 1948. I contacted Mr. Marshall about a week before. He told me where they were but I don't believe he could quote me a price at that time. He later quoted $500 a lot for the three lots. The whole transaction from beginning to end was with Mr. Marshall at the Bistline Agency.

BEVERLY B. BISTLINE

plaintiff, testified as follows:

Direct Examination

By F. M. Bistline:

I am the daughter of F. M. Bistline and Anne Bistline, the plaintiff in this case. I was the donee to certain deeds in 1947 on certain real estate. The deeds were made by F. M. Bistline and Anne Bistline to me. My occupation in 1947 was office manager and vice-president of the Motor Transit Company and my duties consisted of doing all the office work, scheduling bus drivers and keeping my eye on mechanics and just in general ran the bus company. It was full time employment. My occupation for the previous five years: After my graduation at the University of Idaho in 1943, I worked as office manager of the bus company and then I was in the [14]

Waves in the Navy for almost three years. This same employing continued during all of 1947 and until December, 1948, and then I went to work as a legal secretary in the office of Bistline and Bistline.

I never advertised any of the lots for sale. I took no interest in seeking purchasers. I did not have a real estate license. I did not maintain a real estate office. I did not list this property with any real estate broker. I was in Tennessee when O. R. Baum called, and I was present in the Motel in Memphis when he talked to F. M. Bistline in connection with these sales.

F. M. Bistline acted as adviser. He had been experienced for a long time in business and I was inexperienced and I relied on his advice in these matters, and sought his counsel when the problems were presented. I did not sell any of the property without signing the deeds or contracts myself. I never gave a power of attorney to anyone else to sell this property or handle it for me. I did it myself. I was handed the check for the purchase of the land sold to the Simplot Corporation or Pocatello Heights. It was made out to me.

With regard to the other sales Mrs. Peterson testified to and Mr. Coats, I recall they came to us—to me—because I was the owner of the property until negotiations were made and my father and I consulted about the sales and it was decided to make them and I made the sales.

Cross-Examination

By Mr. Biggins:

The Simplot check was made out to me and I endorsed it. I don't [15] remember whether I deposited it in my account or whether I gave it to my father. If my father received that check, which I am sure, I would not say he appropriated it to his own use. My father took care of these matters for me, but it was not without talking to me about it. We would have much conversation about the advisability of whether or not we should sell the property, and we conferred about it, and I mean it was my decision in the end.

Q. (By Mr. Biggins): For instance, after you went down to Utah and to California to school some property was still being sold, wasn't it?

Mr. Bistline: If the Court please, that is way beyond the issues of this case.

The Court: I don't know any reason why Mr. Bistline couldn't be her agent acting for her.

Mr. Biggins: I will cut off this cross-examination if counsel will stipulate he was her agent.

Mr. Bistline: I will stipulate that I was acting as sort of a business agent or adviser. I had no authority to execute conveyances. I was her adviser.

The Court: Then you are stipulating you were acting as her adviser and counselor in making these transactions.

Mr. Bistline: I am perfectly willing to stipulate that.

The Court: I don't see where that alters the situation.

Mr. Biggins: I believe in our conversation you characterized it as a more or less oral power of attorney, is that correct? Can I accept [16] that as a stipulation?

Mr. Bistline: Well, I don't think with regard to real estate transactions. I think the Court understands the situation.

The Court: I think it is a very natural situation for a father who is a lawyer and experienced in business transactions to counsel and advise his own child with respect to making business transactions. I don't think that is very unusual.

Cross-Examination
(Continued)

By Mr. Biggins:

I was released from active duty in May of 1947 from the Waves. I did not know at the time I separated from the Waves that I was going to get the gift of this property. I knew I didn't have to report income tax from my pay from the Waves. When I estimated my income tax for 1947 of approximately $400 I didn't expect to get any land from my father. I didn't know my father was going to deed any lots to me when I made my declaration. I don't remember what income I expected to receive to pay such a tax on.

Redirect Examination

By Mr. F. M. Bistline:

I owned a certain piece of rental property consisting of four units at 269 Washington at that time.

The property included in the sale to Pocatello Heights and to Smith-Marshall Company or the Empire Investment was located on what we call the east bench in Pocatello, and at the time was sagebrush, hills, with absolutely no improvements on it whatsoever. There was nothing up there except sagebrush and some of the property was depleted [16-A] —gravel pit and there was just nothing. Several lots were in the gravel pit.

Recross-Examination

By Mr. Biggins:

I can't remember within 50 lots how much property my father gave me in 1947. I knew I didn't have to make an estimate of the income from the bus company because that would be withheld. I didn't receive a deed to the Alameda property July 1, 1947. I received it before that. (At this point it was stipulated that plaintiff bought the 4-unit apartment at 269 Washington in 1940 at a Probate sale, and that the apartment property included in the July 1, 1947, deed was 353 Washington.)

I don't remember whether the taxes were paid on the property sold to Simplot or whether the taxes on the other property I received from my father were paid. I know the approximate location of most of the property. A good portion of it was on the east bench. I didn't know anything about Smith-Marshall Agency wanting to develop that area. I knew when they bought it that they had it in mind. It was common knowledge by everybody in town. I

knew when they went in and developed that it would probably enhance the value of my remaining holdings. With regard to the Albertson property. F. M. Bistline got the money and paid tax on it. It was right when this gift was pending and it was originally reported in my return but moved over to his and no protest was made on that.

I wouldn't say exactly that anything my father did with regard to these properties was all right with me. I can't think offhand of a single [17] instance where we didn't agree, but I want to make it clear that whenever these deals, these opportunities came up that we always had full discussion about them and that if he advised me and I thought it was a good thing to do I usually followed his advice because as I mentioned before I was inexperienced and naturally would rely on what he advised me. He wouldn't be able to tell these people whether or not the lots could be sold. We would talk it over and then decide whether or not it was the thing to do. It was usually the case that he talked to them and closed the sale after going over the matter with me. I can't offhand think of a single exception.

BEVERLY B. BISTLINE

recalled.

Redirect Examination

I made two sales in 1949. One was to a Mr. Lacy and one to Mr. Smith and Mr. Marshall, the latter being land located in what is now known as the College Terrace Addition. It was in connection with

the ground that was sold in 1948. It was all unimproved land and consisting of sagebrush, and gravel pit. There were a couple of blocks as I recall. The other sale to Mr. Lacy was under the circumstances that the Boise Payette Company called and made arrangements about it, and it was through them that the sale was made. I think it was four lots. I made one sale in 1950 to Mr. Whitaker out near his green house; it was one lot for $400 I think. I don't recall any sales in 1951.

Recross-Examination

By Mr. Biggins:

I haven't any idea how many lots I still own without refreshing my memory. In 1948 the Bise, Inc., corporation was organized, the purpose of [18] which was to put our income into it for the purpose of handling contracts, or any business that might come along. The corporation was formed in 1948. Contracts and mortgages on property were handled by the corporation. Not necessarily that which we sold. Maybe someone might have come in and asked to borrow money on their property. You might call it a finance corporation. I don't know the proper terminology. The corporation was a family business. As to whether the real estate dealings were pooled along the family lines, I told you before my father was my advisor in these business matters. (A copy of protest filed with the Internal Revenue Service was shown the witness.) It read in part: "This protest has been repared by F. M. Bistline."

Witness reads from document: Q. "The frequency of sales was due to an abnormal post was demanded for real estate in Pocatello and not due to any activity on the part of taxpayer or anyone for her. Pocatello experienced a population increase from 1940 of more than eight thousand which created an unusual demand for residence lots." I knew that to be a fact at the time I submitted the protest. This was common knowledge. The reason I did not employ real estate agents was because there was no reason to employ a real estate agent. It is true there was an abnormal demand. The community was growing at that time, and people were coming around to see me to buy the lots or my father. There was no need to employ real estate agents. I felt if there were any sales to be made we were perfectly capable to handle them. I knew if people wanted this property they would probably come around and look me up. [19]

ROLLAND SMITH

plaintiff's witness, being sworn, testified:

Direct Examination

I live at 375 Fanning, Idaho Falls. I am now and have been in the real estate, insurance and mortgage loan business for 15 years and at present have places of business in Pocatello and Idaho Falls. The name of the present organization is Mortgage Insurance Corporation, a corporation. It succeeded in the name of Smith-Marshall Agency, Incorporated, which in turn succeeded in the name of Bistline Realty Com-

pany, a corporation. I had an interest in the Bistline Realty Company which I acquired on December 31, 1945, from F. M. Bistline and J. M. Bistline, his father. I acquired a one-third interest from each. The remaining third was owned by Mrs. Paul Bistline, so that beginning January 1, 1946, I was the owner of two-thirds of the stock in the Bistline Realty Company and Grace Bistline was the owner of the other third. I was president and manager of that corporation. The name was changed to Smith-Marshall Agency in January of 1948 after Mr. Marshall had bought an interest in it. I have been associated with this business in some capacity as salesman or otherwise since 1939. I went to military service in 1942, and on my return bought out the two-thirds interest as stated above.

Before I went into the service in 1942 we had a "cardex" system of some lots owned by you (F. M. Bistline). We had no written listings, and there was no specified price put on them. After I came back—bought out the business and took over the control and management of it. Beverly Bistline never gave me any listings of property she had, and you did not. And you did not give [20] me any additional lots and descriptions. We still had the old book there. I recall a sale of some property of Beverly's to Mr. Peterson, and one to E. F. Brick. Those were in the book that was there before the war.

In 1948 Mr. Marshall and I became interested in the land which is now College Terrace. We were attracted to it in that I had always considered that area as having a desirable potential for residential

development and so interested myself to the extent of checking the county records to determine the ownership and found that the county had apparently taken tax deed on a number of lots up there. I don't recall the exact number, but I do recall it was approximately 20 acres of ground, and in checking the records, and along with my previous knowledge of the lots that you (F. M. Bistline) and Beverly owned in the area, we, or, I catalogued the ownership of all the lots that we were interested in on what is known as the east bench or College Terrace. Bannock County had the largest proportion, and the lots that the County owned were the most contiguous, so I asked the commissioners to put the land up for sale, for bid, and they subsequently advertised it and held a public sale and on behalf of a newly formed corporation known as the Empire Investment Corporation I bid the land in. As soon as I acquired title to the former county property and Empire Investment Corporation then I approached you to purchase several lots contiguous to the county property.

The terrain of this property I approached you with regard to buying [21] was: The property had been operated as a "batching" plant for a cement mixing outfit. The operator was a Mr. L. E. Reid and he had operated it since about 1937 or 1938, and had excavated practically all the area at some time or the other for the purpose of removing the gravel and the terrain was very uneven. There was some pits as deep as 50 or 60 feet below the level of the overburden that had been piled around the area.

We filled this property after acquiring it. The only fill was put in there was the excavation from the Pocatello Heights buildings, and, as I recall, there was about 20,000 yards of fill that came out of these excavations that went in there. The rest of the work necessary was leveling, grading, back-filling and removing these piles of dirt and leveling it out. The cost of this, I would say, was about $15,000 initially.

I have been in the real estate business 15 years and have bought several lots and developed nine subdivisions with an average of about 200 houses in each subdivision and have sold about 1,800 lots in those deals. I have dealt in property all this time and I figure I am qualified to pass upon the value of vacant lots in Pocatello. A lot of these transactions were in Pocatello.

I have formed an opinion as to the market value of that property which we acquired from Beverly B. Bistline and the county as resident lots at the time we purchased it. My opinion is that it had no market value for residential lots. It was a part of the original townsite and it was zoned as residential property, and as residential property in the condition it was in [22] it had no market value. I would recognize this land from an aerial photograph. (Witness examined photograph, which was offered and received in evidence as Exhibit No. I without objection from counsel for the defendant.)

I can point out on Exhibit No. I the property I have been talking about that we purchased. I bought lots in 1948 from Beverly and some from you, and in 1949 you bought some more. (The Court at this

point suggested that the witness mark 1948 on the one and 1949 on the other and the witness did as requested.) I have indicated in blue pencil the area including the property which was acquired in 1948 and in red pencil the area which includes the property acquired in 1949. In both instances it includes other properties other than those which were specifically acquired from you and Beverly.

I have marked the Simplot property in blue pencil and there is no date on it. I don't recall trying to buy more of the ground in that neighborhood in 1948.

Before we sold this ground which we acquired we replatted it and as already stated filled and levelled it. We found a good market which I attribute to the influx of population and the natural growth. I think the marketability of that area in particular was that it afforded a view. It was contiguous to a very desirable developed residential area and I found very wide public acceptance. We named it College Terrace. It is near Idaho State College. We also put in sewers. If those improvements had not been done I do not think there would have been any market for that property during [23] 1948 and 1949 for residential purposes.

Cross-Examination

By Mr. Biggins:

I do not know whether Mr. Bistline had any visions of developing this area. I was dealing in vacant properties when I was working for the Bistline Agency. I don't recall any specific sales of

properties owned by Mr. Bistline prior to my acquisition of the business. We did have a book on file of the properties he held. If property was sold the office received the commissions. I was salaried. Commissions were paid on sales. It was my understanding the property was available for sale to anybody that might inquire. It was a cardex system, which includes some lots owned by Mr. Bistline. The card did not indicate the asking price of the lot. Only the legal description of the property was on the card. I knew who owned it because Mr. Bistline's name was listed as the owner. When inquiries were made I asked Mr. Bistline if he were interested in selling, and, if so, at what price and what terms. His office was in the rear of the real estate office part of the time, part of the time in the Dietrich Building.

After the two gifts deeds from F. M. Bistline to his daughter, Beverly, we were not advised what properties he owned as distinguished from his daughter. So far as I was concerned the F. M. Bistline properties were those set forth in that ledger. As to whether they were available for sale I didn't know whether or not they had been sold. The list so far as I was concerned was never maintained up to date. If somebody inquired of a lot in the book I had to call him to see if it had been sold already. I knew [24] those lots were available for sale. I did call him on a number of occasions after July 1, 1947, for instance, Mr. Peterson, and Mr. Lacy and perhaps some others. I was never informed that any of that property was taken off the market. All I did was call up to see if it was sold already, and if

we succeeded in getting a customer we got paid a commission. None of this property was advertised for sale by me after July 1, 1946. The only advertising I have ever done on vacant lots were properties I had a financial interest in. If it should develop from the testimony of Mr. Marshall, my associate, that some of the Bistline Agency signs were posted on vacant property that might belong to F. M. Bistline I would contradict that testimony.

I would contradict testimony of Marshall that they advertised through our agency lots belonging to F. M. Bistline in the Pocatello Tribune and Idaho State Journal. Mr. Bistline never told me not to advertise that property. The truth of the matter was not that the demand for that property was so urgent that we never had to advertise. The only difference in the way such lots was handled before the sale to me in January 1, 1946, was that after Mr. Bistline relinquished his interest in the business to me there was no effort on either of our parts to maintain an active catalog of the properties that he might have available for sale. We retained the list if we had an inquiry concerning one of those properties we would treat it just like any other brokerage transaction, in that, of course, if he was interested in selling [25] we would try to bring the purchaser and the seller together. I paid a money consideration, for Mr. Bistline's interest. I don't recall the exact amount. The president of the Bistline Realty Company prior to January 1, 1946, was F. M. Bistline, and its business was real estate brokerage, insurance, fire and casualty insurance. Mr. Bistline

was not an active participant of that corporation. I first worked for the company in April, 1939. The active manager was J. T. Doran. The only thing Mr. Bistline contributed to the operation of the agency was as a legal adviser. He was paid on a fee basis. He received no direct compensation. It came in the form of a participation and of profits.

Redirect Examination

By Mr. Bistline:

I don't know whether the book that had the listing of various properties had any descriptions of the property in the old gravel pit or lying east of 15th Avenue. I know I didn't have any interest in those properties until after the war.

Recross-Examination

By Mr. Biggins:

I would say that there was an abnormal demand for vacant lots around 1946, 1948 and 1949 in this community but not necessarily on account of the increased population. The fact people who otherwise would have been able to acquire a home were deprived during the war years probably had something to do with it. For awhile they couldn't build and when the war-time activities were released there was a burst of activity. But it was not necessarily the burst of activities that advertising was not necessary. One [26] of the reasons not much money is spent on advertising as far as vacant lots is concerned is because of the compensation involved. It

doesn't justify any advertising expenditure. The compensation is usually five per cent, and if someone wants a lot they will come in and inquire.

BEVERLY BISTLINE

was recalled and testified as follows:

I was married to A. R. Spaulding on June 27, 1948. At the time of our marriage I owned the property a description of which has been read into the stipulation here as being the property given to me by gift from my father and mother. The marriage was dissolved by divorce on September 1, 1949. There was no agreement ever made between me and Mr. Spaulding with regard to this property that would in any way change its character from my own separate property. There was one other transaction in 1948 in which Mr. Spaulding was involved on a sale of real estate, that was his separate property and I had nothing to do with the same. I make no claim with regard to that.

Mr. Biggins: No questions.

(Plaintiff rests.) [27]

DEFENDANT'S CASE IN CHIEF

F. M. BISTLINE

called as a witness on behalf of defendant, testified as follows:

The Bise, Inc., corporation was organized in 1948. It was to be a family holding corporation. It was never actually completed. We planned to turn the

contracts and mortgages in and take interest in debenture form. There was no real estate in that corporation except on the occasion when we made one bad loan and had to foreclose and we got three lots through the foreclosure and those were immediately deeded out to Beverly. The corporation was never completed. We did put the money into a bank account under the name "Bise, Inc.," and we kept a set of books during that period with all the contracts and everything in there. Grace Bistline was the holder of one share of stock—a dummy incorporator. She had no interest in it. She is the widow of my deceased brother. She is a stockholder in the Mortgage-Insurance corporation, formerly Bistline Realty Company. She is employed there now and has been since 1947. This corporation was not to take care of the financing of the property that was sold. The mortgages came from loans that we made from sales of property and from income from the bus company, we had a little money to invest.

I had sold quite a little property prior to 1946, and Beverly made [28] the sales involved in this case in 1947 and 1948. Most of the contracts were mine, some were Beverly's. We originally intended that these mortgages be held by the corporation, but I got scared on this personal holding company and I backed out of it pretty fast. We planned to put in future sales. I suppose perhaps I had a hope that we would make more sales. One never knows when he is going to sell real estate, particularly vacant real estate. I would have sold these parcels of

real estate if we could come to terms, but I want to make it clear that at no time did we ever go out and set prices on that property and endeavor to sell it. As to how the sales were made, take the Coates sale for example. He came into my office and said he had been over to the Court house and found out Beverly had several lots he would like to buy, and inquired and found out I was her father, and he thought he would come up and talk to me about it, and he wanted to know if we would be interested in selling it, and I told him I thought we would be interested in selling it. Those are not the exact words. I naturally would use the word "we" in the family. As to discussing the price, I generally ask the other fellow to name his price first, that is what he would be willing to offer. It makes it a little easier because he might offer more than I would have sold the lot for, and I was trying to get all I could out of them. I couldn't accept for Beverly without her approval. I would tell them I would talk it over with her, and I never had any trouble with them coming back. My daughter had considerable confidence in my judgment. I couldn't sell without her approval. I [29] couldn't sell her property. I don't recall any cases where I recommended a sale that she disapproved of. All taxes were paid on the property Beverly sold to Simplot's at the time she sold them.

I bought the property which Beverly sold to Simplot in 1939, and while I thought I saw a very nice piece of property there that could be developed into a residential district, at the same time due to

the character of the property and its raw condition and big holes in the ground and so forth I was very doubtful if I would ever be able to sell it, consequently I did not pay any taxes on it until 1943, and in 1943, the main reason I paid my taxes on it was because I was in the bus business and I got a very lucky break with an air base here, gasoline rationing, and I was looking for income tax deductions, and I went over and paid about $4,000 worth of taxes on that and other property. Beverly paid all the taxes on this after I deeded it to her.

I could afford to have put in curbs and gutters like Smith-Marshall did. I had more capital than they did, but I was not interested in retail development of subdivisions. I have only been interested in selling vacant lots as an investment. I have found it to be very good investing to but properties at a low price and hold them until become of value. You can't drum up sales for vacant properties no matter how much you advertise. During the years 1938 and 1941 you could buy lots in this town for $50.00 on up to $100.00 and very choice lots, and you couldn't sell them for $50.00 or $100.00 unless somebody wanted them you could advertise full [30] page ads every day and I don't think you would. I didn't advertise my lots for sale because I wasn't interest in advertising. I wasn't interested in any particular fast sale of these lots. I have another good reason for that. During some of those years the bus business was awfully good and they had me up in an income tax bracket where I wasn't interest in sell-

ing and paying additional tax. I owned some of these properties in common with one A. Y. Satterfield in undivided half interests. I could sell my interest and he could sell his. He went into the real estate business. I had nothing to do with that. Paul Evans and I also had some property in common in undivided half interests. He is a licensed real estate broker. I was president of the Bistline Realty Company until December 31, 1945. I never gave a thought about the book with the description of the lots in it being there after I sold out. Smith-Marshall came to see me very frequently and also other real estate dealers and asked me to give them listings of my property and they didn't get them.

WENDELL MARSHALL

called as a witness by defendant, being first duly sworn, testified as follows:

I live at 248 South 15th, Pocatello, I am a real estate broker, and have been since 1947. I returned to Pocatello in 1935. I am acquainted with one Rolland Smith and was in business with him as a commission from 1947 through 1948 and then a stockholder from that time until 1951.

While working for that company I recall having handed some [31] property of F. M. Bistline's for sale. As to whether any of that property was advertised for sale there was some advertising in our regular classified advertising as to vacant lots.

It would read something like this: "Lots for sale in northeast section of the City of Pocatello" and

then that would be about the extent of it. It wasn't extensive advertising, no large promotions or anything, but it was included without advertising of residence and that sort of thing. We posted some for sale signs on some of these properties. I can't recall that I posted a sign on the property Mr. Brick bought. I recall placing a sign on a lot on North 14th in the 300 Block. There was a group of six lots in that group. That is the one sign I recall being on a lot, other than that I don't recall any signs on Mr. Bistline's properties. The sign read Bistline Realty for sale, and giving the phone number and address. As a result of these signs and some of these classified advertising inquiries were sometimes made to purchase those lots and we sold several of them and received a commission.

Cross-Examination

By Mr. Bistline:

We didn't have any written listings on any of that property. The only authority we had from Beverly B. Bistline to put this sign on the lots was only in that they were verbal listings in the office, and of course, any listing we generally place the sign in—Beverly never gave us any listings, the listing were all given by you, and the book that had the listings in was in the office when I came in, and was never added to. We revised it. There were additions of properties while I was there, for [32] example this group of six lots is an example. I believe that was an addition because as I recall there were some title problems that had to be cleared up

before it could be sold, and it was added after that. It had had a ditch running by it, but I believe it had been covered at the time I started. I recall that I asked you for additional listings, there was quite a little activity, and we were soliciting properties for sale, yes. I don't recall specifically. Yes, I asked you for listing. I didn't get any written listings. As to getting listings on any properties other than those that were in that book, I can't recall exactly what was in the book. None of the lots that Mr. Smith and I bought from Beverly and you in what became later College Terrace Addition were in that book. And it did not contain a listing of any of the lots that the Simplot people bought in Pocatello Heights. I took it upon myself to go out and put those signs on the property without asking you, inasmuch as they were listed in the office we proceeded with the normal sales procedure which on a vacant lot generally includes placing a lot and advertising or what other methods you can.

I handled the Peterson sale. I recall them coming in. And after they contacted me I sold them the property and proceeded with the sale. I called you to ask what price to put on them. We always had to do that because they were verbal listings and subject to change and we [33] had to check before a sale could be made. I added my commission to it.

In running advertisements of lots in the paper I never described any lots that were owned by Beverly. We didn't describe them as individual lots and give ownerships. We ran the advertisements

with the hope we might find some customers and then we could expect to contract you with regard to the sale, or anyone else if we found customers in that part of time, we would try to find the owner and make a sale.

We tried to get exclusive listings. We always try to do that. We couldn't get an exclusive listing. But we got a verbal listing.

Recross-Examination

By Mr. Bistline:

I didn't get any listings from you. I used the book that was in the office. Those were considered to be listings in the office. The book was there when I came in. I personally didn't get any exclusive listings from you although I asked you for them from time to time. I can't recall any specific instance of getting any listings from you for myself or the office.

REBUTTAL

BEVERLY B. BISTLINE

recalled as a witness by plaintiff testified as follows:

Mr. Bistline: At this time the plaintiff moves to reopen her case.

The Court: Very well, you may reopen with the right of the Government to rebut it.

(Whereupon, plaintiff reopened.)

A. Since yesterday I have checked my investments to ascertain [34] what became of the proceeds

of the sale of the property involved in this case, and I find that it has been reinvested in other property and mainly in stocks, mortgages, contracts and such investments as that. I have approximately $36,000 in contracts and mortgages. My stock investment is about $10,000. And I have roughly about $10,000 left in real estate.

Cross-Examination

By Mr. Biggins:

As to the value of the real estate I got as a gift from my father at the time he gave it to me. I would have to refresh my memory on it. I don't know just off hand. There have been sales made on some of the real estate given to me. I don't know the exact number of lots that aggregates the $10,000. I would have to check that. I arrive at the $10,000 valuation by estimating the present value of the number of lots that I have. I am not sure exactly how many. I made the estimate with the advice of my father. The real estate contracts were the result of real estate sales. The mortgages went to people who came in to borrow money. My father was acting as my advisor to make investments for me and as such money was available to my father for loans. Some of the $36,000 is in mortgages and some of it is in contracts. I wouldn't say that I have had many more mortgages than I have now. As a result of the real estate sales we have had money to invest in loans and other property and other investments. F. M. Bistline didn't use any of

of the $15,000 from the Simplot sale when the bus company was in need of funds, [35] so far as I know. I think I told you yesterday that money was given to my father to use for me in investments and paying taxes on property. I don't know whether I said that I didn't know what he did with it. He wasn't using it in his business. It was given to him by me to use for purposes to invest.

He has never given me a written accounting. We have discussed, on an informal basis. We talk things over. My father is familiar with the stock market and does my investing for me. My father acts as advisor counsel, business counsel. I rely on my father's good advice on what stocks to buy. As to your question as to whether he is an agent. I won't say agent, no. He is my advisor and counsel in these business matters.

Examination

By Mr. Bistline:

I have seven lots behind the Simplot apartments, I figure they are of a value of $2,500. The lots on 19th Avenue, I think about $3,000 on those. Then I have quite a number of miscellaneous lots that are unimproved that I lumled off at approximately $10,000.

Examination

By Mr. Biggins:

I have some property valued at $3,500.00. If somebody came in my father's office today and asked to buy them for $3,500 I can't say exactly

whether I would sell them for that price. We would have to talk it over. That is roughly the value I put on them. Probably we would sell them for that price. We would have to talk it over and decide whether that was the terms we could come to. And this lot which you say I said was worth [36] $2,000, the same would be true if we could come to satisfactory terms. By terms, I don't necessarily mean the down payment or tal sales price. It takes a lot of things to make a sale. When I say the lot is worth $2,000 I possibly may mean that I would sell it for that price, but I may not want to sell it.

(Plaintiff rests.)

Mr. Biggins: No surrebuttal.

Appellant submits and files the above and foregoing as a true, full, correct and complete narrative summary statement of all of the testimony offered or received, and all the proceedings had in the trial court at and in connection with the trial of said cause, for use upon her appeal taken to the United States Court of Appeals for the Ninth Circuit.

Dated this 20th day of August, 1957.

/s/ F. M. BISTLINE,

/s/ R. D. BISTLINE,

Attorneys for Appellant.

[Endorsed]: Filed August 26, 1957.

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.
2. Motion to add A. R. Spaulding as party plaintiff.
3. Order adding A. R. Spaulding as party plaintiff.
4. Summons and Return of Service on A. R. Spaulding.
5. Answer.
6. Memorandum Opinion.
7. Findings of Fact and Conclusions of Law.
8. Judgment.
9. Notice of Appeal.
10. Statement of Points to Be Relied Upon by Appellant.
11. Narrative Statement of Testimony and Proceedings.
12. Designation of Matters to Be Included in Record on Appeal.
13. Plaintiff's Exhibit No. 1.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court, this 9th day of September, 1957.

[Seal] ED. M. BRYAN,
Clerk.

By /s/ LONA MANSER,
Deputy.

[Endorsed]: No. 15716. United States Court of Appeals for the Ninth Circuit. Beverly B. Bistline, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed September 11, 1957.

Docketed: September 19, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15716

BEVERLY B. BISTLINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT.

Following is a concise statement of the points upon which plaintiff-appellant, Beverly B. Bistline, intends to rely on the appeal of the above-entitled cause:

1. The District Court erred in entering judgment denying appellant the right accorded by the Statutes in such cases made and provided to pay her income tax on one-half of the gain realized by her on the sale to the Empire Investment Company, a corporation, in one transaction, of the hereinafter described real estate which was acquired by her donors in 1939 and deeded to her in 1947, the sale price of same being $1900.00 and the net gain to her or $1800.00, which real estate is particularly described as follows:

Lots 4-17 inclusive in Block 2,
Lots 1 and 3 of Block 3,
Lots 5, 6, 7 and 10 and 13-19 inclusive of

Block 54, and all of Block 6, all in Pocatello Townsite, Bannock County, Idaho,

for the reason that the evidence is conclusive that said property was not held for sale by said plaintiff to customers in the ordinary course of her trade or business, with particular emphasis on the fact that said property consisted of lots zoned residential and their physical condition was such that they were not marketable as that class of property.

2. The District Court erred in entering judgment denying appellant the right accorded by the Statute in such cases made and provided to pay her income tax on one-half of the gain realized by her on the sale to the Pocatello Heights Apartment Corporation, in one transaction, of the hereinafter described real estate which was acquired by her donors in 1939 and deeded to her in 1947, the sale price being $16,400.00 and the net gain to her, $14,900.00, which real estate is particularly described as follows:

Blocks 44, 26 and 27 and lots 19 and 20 of Block 21 of Pocatello, Townsite,

for the reason that the evidence is conclusive that said property was not held for sale by plaintiff to customers in the ordinary course of her trade or business, with particular emphasis on the fact that sales of building sites from said tract had theretofore been rejected, and that the same had been withheld from the market with a view to possible future development and was sold only because of the spe-

cial occasion of the apartment project being built on same in the public interest.

3. The District Court erred in entering judgment denying appellant the right accorded by the Statutes in such cases made and provided to pay her income tax on one-half of the gain realized by her on the following sales of real estate:

> Lots 19 and 20 in Block 356 of Pocatello Townsite to Kenneth Draper for $1500.00 for a net gain of $1400.00, same having been acquired by her donors in 1937 and deeded to her in 1947.
>
> The South One-half of Lot 9 and 10 in Block 274 of Pocatello Townsite to Thomas J. Coates for $1000.00, for a net gain of $950.00, same having been acquired by her donors in 1939 and deeded to her in 1947.
>
> Lot 17 and the South One-half of Lot 18 in Block 519 of Pocatello Townsite to Albert Anderson for $1000.00 and a net gain thereon of $700.00, same having been acquired by her donors in 1945 and deeded to her in 1947,

for the reason that the evidence is conclusive that they were not held by plaintiff for sale to customers in the ordinary course of her trade or business with particular emphasis on the fact that there is no evidence that plaintiff was seeking a market for the same and that the sales in each instance were made by reason of the purchasers looking up the property first, and then looking up plaintiff.

4. The District Court erred in entering judgment denying plaintiff the right accorded by the Statutes in such cases made and provided to pay her income tax on one-half of the gain realized by her on the following sales of real estate:

> Lots 12-14 inclusive Block 50 of Pocatello Townsite to H. A. Peterson for $2,100.00 for a net gain of $1898.75, same having been acquired by her donors in 1940.
>
> South One-half of Lot 6 and all of Lot 7 in Block 52 of Pocatello Townsite to Edward F. Brick for $750.00 and a net gain of $550.00 same having been acquired by her donors in 1939,

for the reason that there is not evidence in the record sufficient to establish that said property was sold by plaintiff, or held by her for sale to customers, in the ordinary course of her trade or business with particular emphasis on the facts that if there was a listing of either of these properties with the real estate firm that interceded in the sale that it was without knowledge on the part of plaintiff, that the sales were made by reason of the purchasers seeking the property without any effort on the part of plaintiff, that nothing was done by way of improvements on said lots to attract buyers; and that the element of frequency is lacking.

5. The District Court erred in entering judgment denying appellant the right accorded by the Statutes in such cases made and provided to pay her

income tax on one-half of the gain realized by her on each of the sales, which are the subject matter of this action for the reason that there is not sufficient evidence in the record to establish that such property was sold by plaintiff, or held by her, for sale to customers in the ordinary course of her trade or business.

/s/ F. M. BISTLINE,
/s/ R. D. BISTLINE,

Attorneys for Plaintiff-Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 30, 1957.

No. 15716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY B. BISTLINE,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

Petition For Rehearing and Brief

TO THE HONORABLE CIRCUIT JUDGES:
POPE, FEE, AND HAMLIN:

F. M. BISTLINE
R. DON BISTLINE
P. O. Box 8,
Pocatello, Idaho
Attorneys for Appellants.

GATEWAY PRINTERS—POCATELLO

No. 15716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY B. BISTLINE,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

Petition For Rehearing and Brief

TO THE HONORABLE CIRCUIT JUDGES:
POPE, FEE, AND HAMLIN:

F. M. BISTLINE
R. DON BISTLINE
P. O. Box 8,
Pocatello, Idaho
Attorneys for Appellants.

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CITATIONS

No. 15716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY B. BISTLINE,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

Petition For Rehearing and Brief

PETITION FOR REHEARING

Appellant respectfully petitions this Honorable Court for a rehearing of the appeal in this cause, and in support of this petition represents to the court as follows:

We reserve our argued position as to each of the points on appeal, but in this petition address ourselves to those features of the decision wherein we believe the court may be convinced its result is based upon the application of incorrect legal principles.

I.

Therefore this petition is devoted to convincing this court that it has erred in its determination of the main question put to it upon the appeal, to-wit, that the evidence taken as a whole does not support the conclusion reached by the trial court, in that this court has based its opinion upon a large number of inferences, not supported by evidence in the record, same being (From the printed opinion. Italics ours) :

"There are facts from which *a strong inference* can be drawn that F. M. Bistline had held the property for sale in the real estate business." Page 2, Line 13.

"The reason for not selling some of these properties from *1938 to 1941* was stated by F. M. Bistline * * *" Page 2, Line 33.

"Her attitude was not passive." Page 2 Line 40.

"There is no doubt that F. M. Bistline handled all of the real estate transactions of his daughter *as her agent, in continuity with his previous dealings therein.*" Line 5, Page 3.

"Although she was fully employed in another enterprise which he owned, she was *in effect* engaged also in the real estate business *as a joint enterprise.*" Line 9, page 3.

"These sales did not wind up her dealings in real estate." Line 31 page 3.

"He continued to act as a real estate *agent* where before he had listed the properties as owner in his own office *apparently with the knowledge of Beverly.*" Line 5, page 4.

"* * * and there is *an inference* that it was also for sale." Line 13, page 4.

"The money from these sales was reinvested in other real estate." Line 14, Page 4.

II.

This petition is also devoted to convincing this court that it has erred in its determination of the case by not giving individual and separate consideration to the *First* and *Second* POINTS in our Statement of Points To Be Relied Upon by Appellant (Tr. 73-77), (appellant's brief, pages 13 and 14).

It is our position that regardless of whether F. M. Bistline had still owned this property, or whether Beverly owned it or they owned it as a joint enterprise, that the facts surrounding these two sales do not bring them into the category of property being held for sale to customers in the ordinary course of the taxpayer's trade or business. Both these it is to be observed from the record are special situations. The property under Point 1, was zoned A residential and had no market value as residential lots (Tr. p. 55) because of its rough character, being part of an old gravel pit. Point No. 2, the sale to the Pocatello Heights, Inc., for an apart-

ment site, presents a situation where the uncontradicted evidence shows that sales of this property had been refused (Tr. p. 43) and that the circumstances of its sale was brought about first by a long distance call to Tennessee (Tr. p. 37-40) and then about six months of negotiations. Also that neither of these were listed. (Tr. p. 66).

III.

While the following has no bearing on the case, we respectfully petition the court to strike from the opinion the reference to Beverly B. Bistline being an associate of F. M. Bistline, and that each argued the other's case. The court will, we know, concede that this is not part of the record, and the fact is that Beverly since August 1956 has been employed in the law office of Miller & Brown in Studio City, California. We presume the enrollment of this court shows she was admitted to practice in Idaho in 1955.

For the foregoing reasons, this petition for rehearing should be granted.

F. M. Bistline

R. Don Bistline

Attorneys for Appellant,
Pocatello, Idaho

STATE OF IDAHO)
) SS.
COUNTY OF BANNOCK)

F. M. Bistline, hereby certifies: That he is one of the attorneys for appellant in this cause; that he makes this certificate in compliance with Rule 23 of the rules of this court; that in his judgment the within and foregoing petition for rehearing is well founded and is not interposed for delay.

F. M. Bistline

.....

of Counsel for Appellant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

In the presentation of this matter, we do not mean in any manner to be disrespectful. We believe ourselves sincere and correct in our position.

As noted in the petition we have set forth a number of quotations from the opinion, which we contend are not based upon the evidence found in the printed record of the case. We do not deem it unnecessary to go through these item by item, but generally refer to the record in support of our petition. However, there are a few instances, that we will discuss in detail.

In connection with the inference that F. M. Bistline was in the real estate business. The record shows that he sold out in 1945, on the last day of the year. These sales were made in 1947 and 1948. There is no evidence in the record

as to what property he still held or his activities during 1947 and 1948. We feel this inference is not warranted from the record.

With regard to sales not being made on account of income tax bracket, we feel that the court should have quoted the preceding sentence, so that the quotation would read:

> "I wasn't interested in any particular fast sale of these lots. During some of those years the bus business was awfully good, etc. * * *"

With this additional sentence added the evidence shows a passive attitude on the part of the donor. There is no evidence that any sales were rejected on this account.

With regard to the statement that "Her attitude was not passive." There is no evidence that she or her father or anyone else did anything to make a contact to bring about these sales on her behalf. We refer the court to the witness Coates, (Tr. p. 42,) and Anderson, (Tr. p. 43). Also the evidence of O. R. Baum (Tr. p. 37) and R. H. Smith (Tr. 52) regarding the sales to Pocatello Heights, Inc., and Empire Investment Co.

The court concludes that F. M. Bistline was an "agent" for Beverly. See page 63 of transcript. "I couldn't sell without her approval. I couldn't sell her property."

> Idaho Code Section 55-601. "A conveyance of an estate in real property may be made by an

> instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing."

The court also concludes that this was a "joint enterprise." We have examined the memorandum opinion of the trial court, and no such conclusion was reached therein. In other parts of the opinion the court is insisting that it is bound by the findings of the trial court on findings made on the evidence. We submit that an examination of the record will show no evidence supporting this conclusion.

We can summarize that there is no evidence that these sales did not wind up her dealings in real estate. The only evidence in the record is that a mortgage was foreclosed on three lots, which were deeded to her. This statement will also serve to refute the statement that "The money from these sales was reinvested in other real estate."

POINT TWO. We have set forth in our petition that the court erred in not giving individual and separate consideration to the properties sold to the Empire Investment Company and the Pocatello Heights, in support of our position in connection therewith we refer the court to our Original Appellant's brief, as our authority in support of this contention.

POINT THREE. We believe comment is unnecessary.

CONCLUSION. In conclusion, we respectfully urge that the court grant a rehearing of this cause.

Respectfully submitted,

F. M. Bistline,

.....

R. Don Bistline,

.....

Attorneys for Petitioner

No. 15,718

United States Court of Appeals

For the Ninth Circuit

PHILLIP DANIELS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,
United States Attorney,
GEORGE N. HAYES,
Assistant United States Attorney,
Anchorage, Alaska,
Attorneys for Appellee.

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No. 15,718

United States Court of Appeals
For the Ninth Circuit

PHILLIP DANIELS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

On December 1, 1952, Appellant was convicted upon his plea of guilty in the District Court for the District of Alaska, Third Judicial Division at Anchorage, Alaska, the Honorable Anthony J. Dimond presiding, of a violation of Section 65-4-1, Alaska Compiled Laws Annotated, 1949.

Upon such plea of guilty and conviction the Appellant was sentenced to imprisonment for life.

Almost four years subsequently, Appellant filed in the said District Court a "Motion to Vacate and Set Aside Illegal Judgment and Sentence". Appellant expressly made this motion under and by virtue of the authority of Section 2255 of Title 28, U.S.C.

This Motion was filed in the District Court on September 29, 1956.

Appellant's said motion was denied by the District Court and from such denial the Appellant prosecuted an appeal. The Court of Appeals affirmed the trial court's order. Case 15,410.

Appellant on July 5, 1957, filed a second motion in said District Court to vacate and set aside judgment and sentence. Said motion was based on 28 U.S.C. 2255. On July 26, 1957, the Court denied the Appellant's motion.

Appellant prosecutes the present appeal from the July 26, 1957 order of the District Court.

Jurisdiction below was conferred by 48 U.S.C. 101. Jurisdiction in this Court is conferred by 28 U.S.C. 1291, 2253 and 2255.

STATEMENT OF FACTS.

On October 22, 1952, Appellant was indicted in the District Court, Third Judicial Division, Alaska, for murder in the first degree. Appellant was arraigned on November 20, 1952, and pleaded guilty on December 1, 1952. Thereupon, the District Court sentenced the Appellant to be imprisoned for life. Appellant filed on September 29, 1956, a motion to vacate and set aside judgment. Said motion was based on 28 U.S.C. 2255. On November 23, 1956, the District Court denied the motion. Thereupon, Appellant filed an

appeal in the U. S. Court of Appeals for the Ninth Circuit. On May 28, 1957, the Court of Appeals affirmed the order of the District Court denying Appellant's motion. Case No. 15,410, U. S. Court of Appeals for the Ninth Circuit.

On July 5, 1957, Appellant filed in the District Court a motion to vacate and set aside judgment and sentence. The motion was based on 28 U.S.C. 2255. On July 26, 1957, said motion was denied. Appellant prosecutes this appeal from the final order of the District Court.

Appellant relies on four grounds to sustain his claim that the District Court had no jurisdiction over the matter.

ARGUMENT.

The grounds relied upon by Appellant are identical to those relied upon in his first motion in the District Court filed September 29, 1956. They do not differ in any respect. The District Court's denial of the motion was upheld by the Court of Appeals Case No. 15,410 on May 28, 1957. The difference between the present appeal and the prior one on September 29, 1956 lies mainly in that petitioner abandons his prayer for mitigation of punishment by the Court of Appeals.

It is clearly stated in the very statute relied upon by the Appellant, i.e., 28 U.S.C. 2255, that the trial court is not required to entertain a second motion to vacate a sentence. The pertinent part of the statute reads as follows:

> "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

Further, a number of cases support and amplify the above statute. The courts have held that it is within the trial court's discretion to refuse to entertain a second or similar motion to vacate. Only an abuse of that discretion would warrant a reversal of the District Court order.

In *Dunn, Appellant v. United States, Appellee* (6 C.C.A.), 234 F. 2d 219, 1956, the Court of Appeals held that it was within sound discretion of trial court to refuse to consider a motion based on 28 U.S.C. 2255, which motion was similar to prior motions filed by the Appellant and refused by the trial court.

In *Moss v. United States* (10 C.C.A.), 177 F. 2d 438, 1949, the Court heard an appeal from a denial of Appellant's motion to vacate judgment and sentence. The defendant appellant had filed a motion to vacate and set aside sentence. He had previously filed a proceeding in habeas corpus. Evidence was taken by the trial court upon that proceeding and the writ was refused. The Court of Appeals held that it was within the solemn discretion of the trial court whether or not to entertain the second motion. The refusal of the trial court to so do was not an abuse of discretion. The Court of Appeals upheld the trial court.

In *Bickford v. United States* (9 C.C.A.), 206 F. 2d 395, 1953, the Court held that a third motion based on 28 U.S.C. 2255 need not be entertained. The Court

did not elaborate, but relied on the clear and concise language of the statute itself.

CONCLUSION.

The grounds on which Appellant's motion is based are identical to those in his first motion. The first motion was similar to the present one. The trial court denied the motion and the Court of Appeals upheld the District Court. The statute states clearly that the sentencing court shall not be required to entertain a second motion for similar relief. Courts have held repeatedly that it is a matter of discretion. The trial court did not abuse its discretion in this matter. Appellant's motion should be denied.

Dated, Anchorage, Alaska,
May 16, 1958.

Respectfully submitted,
WILLIAM T. PLUMMER,
United States Attorney,
GEORGE N. HAYES,
Assistant United States Attorney,
Attorneys for Appellee.

No. 15,720

IN THE

United States Court of Appeals

For the Ninth Circuit

THOMAS B. RUSTAD, HARVEY R. WYBORNY, HOMER C. SKELLY, CHARLES DIVEN and JAMES JOHNSON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

APPELLANTS' PETITION FOR A REHEARING.

FAULKNER, BANFIELD & BOOCHEVER,
Box 1121, Juneau, Alaska,
Attorneys for Appellants and Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 15,720

IN THE

United States Court of Appeals

For the Ninth Circuit

THOMAS B. RUSTAD, HARVEY R. WYBORNY, HOMER C. SKELLY, CHARLES DIVEN and JAMES JOHNSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable William Denman, Presiding Judge and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellants respectfully petition this Court for a rehearing of this cause and present the following specifications of error in its decision as ground for the granting of such petition:

I.

The information failed to charge an offense, as fishing in Zimovia Strait was not made a crime by the

regulations for alleged violation of which appellants were convicted.

II.

The Court erred in its opinion in failing to hold that the regulation sought to be enforced was invalid due to indefiniteness.

I.

THE INFORMATION ON WHICH APPELLANTS WERE CONVICTED FAILED TO CHARGE A CRIME AND ALTHOUGH NOT ASSIGNED AS ERROR SUCH A DEFECT SHALL BE NOTICED AT ANY TIME.

The information charged that appellants were fishing in Zimovia Strait on July 12, 1956, the waters of Zimovia Strait then being an area closed to commercial fishing "within the meaning of 48 U.S. Code, Section 222 (Alaska Commercial Fisheries Regulations 1956, Sections 121.3 and 121.4)." (Tr. 3.) There is no general statutory closure of commercial fishing in Alaska aside from specific provisions dealing with fishing within a specified area from the mouth of streams which is not here involved. 48 U.S. Code Annotated, Section 221 authorizes the Secretary of the Interior to set apart fishing areas and to establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Section 222 makes it unlawful to fish in an area during the time that fishing is prohibited therein.

The particular regulations promulgated by the Secretary of the Interior under which appellants were

charged are Sections 121.3 and 121.4 of the Alaska Commercial Fisheries Regulations of 1956. Section 121.3 specified:

> "Fishing, other than trolling, in Ernest Sound, and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited except from 6 o'clock antemeridian July 15 to 6 o'clock postmeridian August 18 . . ."

It is noted that this section prohibits fishing in the Ernest Sound and the open waters of Anan Creek but excludes Zimovia Strait from the prohibition. Accordingly, it is clear that Section 121.3 does not prohibit fishing in Zimovia Strait.

Furthermore, it is also clear that Zimovia Strait is regarded in the Fisheries regulations as a portion of the waters of "Ernest Sound and the open waters in the vicinity of Anan Creek". In the only Fisheries map issued by the Bureau in Alaska, Appellants' Exhibit "D" Zimovia Strait falls within the portion of the Sumner Strait District known as the Anan-Ernest Sound Section. That Zimovia Strait is included in the reference to the waters of "Ernest Sound and the open waters of Anan Creek" is further substantiated by the fact that in the regulations it was deemed necessary to exclude Zimovia Strait when referring to those waters. If Zimovia Strait were not to be regarded as a portion of the Ernest Sound and open waters in the vicinity of Anan Creek there would be no reason for the inclusion in regulation 121.3 of the words "excluding Zimovia Strait". Accordingly, it appears perfectly clear that

Section 121.3 did not prohibit fishing in Zimovia Strait. The only other section referred to in the information is Section 121.4. This section states:

> "Open season exception. With the exception of Ernest Sound and the vicinity of Anan Creek, fishing other than trolling is prohibited except from 6 o'clock antemeridian July 20 to 6 o'clock postmeridian August 24. During this season the weekly closed period except for trolling is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday."

In essence this section states that with the exception of "Ernest Sound and vicinity of Anan Creek" fishing is prohibited until after July 20.

Again it is to be noted that Zimovia Strait is regarded as a portion of "Ernest Sound and the vicinity of Anan Creek". Since those waters are excepted from the prohibition, it was perfectly legal to fish therein.

Admittedly this point was not raised by appellants specifications of error and was not arised in the Court below although the question of indefiniteness of the regulation was strongly argued. Rule 52(b) of the Federal Rules of Criminal Procedure specifices:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court".

This rule appears to be discretionary to a certain extent although there are numerous categorical statements to the effect that Appellate Courts will recog-

nize plain errors although not brought formally to their attention. See *U. S. v. Morrissey,* 32 Fed. 147; *Durham v. U. S.,* 237 F. 2d 760, footnote 4, page 761 (9th Circuit); *Stewart v. U. S.*, 214 F. 2d 879 (CCADC); *Taylor v. U. S.*, 222 F. 2d 398 at 404 (CCADC); *U. S. v. Tennessee & CR Co.,* 176 U.S. 242, 44 Law. Ed. 452.

Even more persuasive and more directly in point than Rule 52(b) is Rule 12(b)(2) of the Federal Rules of Criminal Procedure which specifies in part,

> "Lack of jurisdiction or the failure of the indictment or information to charge an offense *shall* be noticed by the court at any time during the pendency of the proceedings". (Emphasis ours.)

It is to be noted that this rule applying to the failure of the indictment or information to charge an offense is couched in mandatory language rather than in the permissive language used by Rule 52(b). It is stated in Barron's Federal Practice & Procedure, Volume 4, page 103:

> "Thus lack of jurisdiction may be raised at any stage of the proceeding and must be noticed by the court even if not raised by motion or objection. In like manner objection that the indictment or information fails to charge an offense may be made at any stage of the proceeding."

In the case of *U. S. v. Manuszak*, 234 F. 2d 421 (Third Cir) it was held that an essential element of the crime was lacking in the indictment and the Court held in reversing a conviction,

> "Although the alleged defect was not brought to the attention of the District Court it can properly be raised in this court for such a defect shall be noticed at any time."

An almost identical situation to the subject case has arisen in this Honorable Court, *Hotch v. U. S.*, 208 F. 2d 244, on petition for rehearing 208 F. 2d 249, and denying further rehearing 212 F. 2d 280. In that case Hotch was convicted for fishing in an area closed to commercial fishing. The case was tried before the District Court upon an agreed statement of facts and after conviction was argued before this learned Court. The conviction was affirmed. By petition for rehearing, for the first time the question was raised that the information did not charge a crime due to the fact that there was no effective regulation closing the area to fishing on the day appellant was apprehended. The regulation closing the area for fishing on the date involved had been promulgated and notice thereof furnished to Hotch. The regulation had not been published in the Federal Register at the time of the alleged offense. Although this matter was first brought to the Court on the petition for rehearing, the Court quoted Rule 12(b)(2), cited supra, and the Court took note of this jurisdictional defense. The government's petition for rehearing was denied, the Court holding at 212 F. 2d 284:

> "If certain acts have not been made crimes by duly enacted law, the knowledge of their contemplated administrative proscription cannot subject the informed person to criminal prosecution.

> While ignorance of the law is no defense, it is conversely true that a law which has not been duly enacted is not a law, and therefore a person who does not comply with its provisions cannot be guilty of any crime."

In the subject case there was no duly enacted law prohibiting fishing in Zimovia Strait at the time appellants were apprehended. It is respectfully submitted that the failure of the information to charge a crime should be noticed by this Court and the rehearing granted reversing the conviction of the Court below.

Judge Pope, in his learned concurring opinion in the subject case, referred to administrative construction of Sections 121.3 and 121.4. In the *Hotch* case the administrative construction was that the regulation, having been promulgated and notice having been furnished to the accused, became enforceable. This Court refused to follow such administrative construction. Moreover, it is respectfully submitted that there is no logical construction that can be given of Sections 121.3 and 121.4 whereby fishing in Zimovia Strait may be regarded as prohibited. An administrative construction cannot make a crime when an offense is not otherwise spelled out by regulation.

It is also to be noted that aside from the fact that an enforcement officer of the Fish and Wildlife Service brought a charge against appellants which was prosecuted by the District Attorney there has been no administrative construction on Sections 121.3 and 121.4.

It is further to be noted that appellants did raise the question in their specifications of error that the prohibition of fishing in Zimovia Strait was too indefinite to be enforceable. If there is ambiguity in the regulation, it would appear to fall within the specification of error 1(a) wherein appellants contended:

> "The District Court erred:
>
> "1. In denying appellants' motions for judgment of acquittal made at the conclusion of the government's case and at the conclusion of the entire case and appellants' motion for judgment of acquittal notwithstanding the verdict and by so doing:
>
> "(a) Failing to rule that the regulation sought to be enforced was invalid due to indefiniteness."

Accordingly, it would appear that the specification of error alleged would warrant consideration of whether the regulation was too indefinite to be enforceable and that if the regulation were to be regarded as presenting an ambiguous proposition pertaining to the prohibition of fishing in Zimovia Strait, the regulation should be held invalid as presented by the specification of error referred to above.

II.

THE COURT ERRED IN ITS OPINION IN FAILING TO HOLD THAT THE REGULATION SOUGHT TO BE ENFORCED WAS INVALID DUE TO INDEFINITENESS.

In the opinion of this learned Court arguments were set forth to sustain the validity of the prohibition of fishing in Zimovia Strait on the basis that allegedly

no other vessels were fishing in the area in question and further for the reason that government's Exhibit 1, a map of the United States Coast and Geodetic Survey, No. 8161, had the words Zimovia Strait written in an area so that the letter "r" appeared opposite the point where appellants were fishing.

The record shows that there were other boats fishing in the area alleged by the government to constitute Zimovia Strait although admittedly the bulk of the boats were fishing close to the mouth of Anan Creek where the fish normally congregate. Thus the witness Rustad testified, page 230, that

> "As we rounded Thorne's Point to the north there was one vessel just completing a set."

Furthermore, the record shows that another vessel was apprehended fishing in the narrow part of Zimovia Strait well to the north of where the appellants were found and that the captain of that vessel was fined $150.00 and the members of the crew $50.00, being less than one-tenth of the fine imposed on appellants in the subject case. (R. 292, 295.)

With reference to the argument pertaining to the lettering on Chart No. 8161, it is submitted that the United States Coast and Geodetic Chart No. 8201, of which this Court may take judicial notice, shows the lettering of Zimovia Strait with the last letter "t" terminating well above Thoms' place and considerably north of the location where appellants were fishing. This chart is also commonly used in navigation and a copy has been tendered to the clerk of this Honorable

Court. Certainly the lettering on a chart is too indefinite a criteria when no particular chart is referred to in the regulation. It is respectfully submitted that the lower Court should have ruled that the regulation was too indefinite to be enforceable.

CONCLUSION.

It is respectfully submitted that the information fails to charge an offense cognizable at law and that a rehearing should be granted.

Dated, Juneau, Alaska,
July 17, 1958.

FAULKNER, BANFIELD & BOOCHEVER,
By R. BOOCHEVER,
Attorneys for Appellants and Petitioners.

Certificate of Counsel

I, R. Boochever, one of counsel for the appellants and petitioners, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and I further certify that the same is not interposed for delay.

Dated, Juneau, Alaska,
July 17, 1958.

R. Boochever,
Of Counsel for Appellants and Petitioners.

No. 15,720

IN THE

United States Court of Appeals

For the Ninth Circuit

THOMAS B. RUSTAD, HARVEY R. WYBORNEY, HOMER C. SKELLY, CHARLES DIVEN and JAMES JOHNSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLANTS.

FAULKNER, BANFIELD & BOOCHEVER,
Box 1121, Juneau, Alaska,
Attorneys for Appellants.

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notice of appeal. (R. 24.) The jurisdiction of the District Court rests upon the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C.A., Sec. 101; the jurisdiction of this Court, on Sec. 1291 of the new Federal Judicial Code.

STATEMENT.

Appellants were fishing commercially at about 12:30 P.M. on July 12, 1956 in Alaskan waters approximately 1.4 miles northwest of Thorne Point. They were in broad daylight, in an unconcealed location. (R. 85.) While so fishing they were arrested by a Fish & Wildlife enforcement officer and were charged with the offense of fishing in a closed area, namely Zimovia Strait, in violation of 48 U.S.C., Section 222, (Alaska Commercial Fisheries Regulations 1956, Sections 121.3 and 121.4, Department of the Interior Regulatory Announcement 48, issued April, 1956).

This regulatory announcement set forth in Section 121.3 thereof authorized an open season for fishing as follows:

> "Fishing, other than trolling, in Ernest Sound, and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited except from 6 o'clock antemeridian July 15 to 6 o'clock postmeridian August 18. . . ."

Section 121.4 provides for an open season in a larger area by specifying:

> "Open season exception. With the exception of Ernest Sound and the vicinity of Anan Creek,

fishing other than trolling is prohibited except from 6 o'clock antemeridian July 20 to 6 o'clock postmeridian August 24. During this season the weekly closed period except for trolling is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday."

On or about July 8, due to a good showing of fish, it was decided to advance the opening day of fishing in portions of the Sumner Strait district. With this in mind, telegrams were sent by the Acting Administrator of Fisheries to the principal fishing companies and to the wildlife enforcement agents on or about the night of July 8, reading as follows:

"ALASKA FISHERY REGULATION 121.3 AMENDED TO OPEN ANAN AND ERNEST SOUND SECTION AT SIX O'CLOCK ANTEMERIDIAN JULY TWELVE THIS ACTION TAKEN BECAUSE ADEQUATE EARLY ESCAPEMENT OF PINK SALMON ASSURED IN ANAN CREEK AS REVEALED BY GROUND SURVEY OF STREAM AND AERIAL SURVEY OF APPROACHES BY FWS OFFICIALS JULY SEVEN ADVISE INTERESTED PARTIES." (Exhibit A.)

"THE ERNEST SOUND AND ANAN SECTION OF THE SUMNER STRAIT DISTRICT WILL OPEN AT 6:00 AM JULY 12 INSTEAD OF JULY 15 PD PLEASE ADVISE INTERESTED PARTIES." (Exhibit B.)

These telegrams did not exclude Zimovia Strait from the Anan-Ernest Sound section open for fishing:

On July 11, a publication was made in the Federal Register amending Section 121.3 as follows:

> "121.3 Open season, Ernest Sound and Anan. Fishing other than trolling, in Ernest Sound, and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited, except from 6 o'clock antemeridian July 12, to 6 o'clock postmeridian August 18. During this season the weekly closed period, except for trolling, is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday."

The Federal Registers are usually received in southeastern Alaska two to three weeks after publication (R. 160) and the fishermen were advised of the change of regulations by the telegrams, Exhibits A and B.

The map regularly issued by the Fish & Wildlife Service during the season of 1956 showed the Sumner Strait district divided in two sections with the lower half being shown as the Anan-Ernest Sound section. This map shows the Zimovia Strait area as a part of the Anan-Ernest Sound section. Appellants were fishing in the section designated on this map (Exhibit D) as the Anan-Ernest Sound section.

The laws and regulations for the protection of the commercial fisheries, Regulatory Announcement 48, U. S. Department of the Interior, Fish & Wildlife Service, April 1956, did not describe the boundaries of Zimovia Strait nor refer to any particular map or chart so that such boundaries could be ascertained. (R. 86.) Moreover, the boundaries were not marked on the adjoining borders of land. (R. 98.)

The appellants first received notice of the change in the regulation by means of radio telephone and rumors reported to them. (R. 224.) The appellants Rustad and Skelly also saw a copy of the telegram Exhibit B. The appellants had never seen the issue of the Federal Register of July 11, 1956. Appellants construed the telegrams (Exhibits A and B), which telegrams did not exclude Zimovia Strait from the area open to fishing on July 12, as opening the entire Anan-Ernest Sound section not closed by other fisheries regulations. (R. 190, 235.) Appellants further did not believe they were in Zimovia Strait at the time they were arrested. (R. 130-131, 232, 241.)

Appellants' fish, including fish caught previously in waters involving no conflict as to being open for fishing, were confiscated by the government, and appellants were required to go to Wrangell, Alaska, for arraignment, losing one and one-half days fishing. (R. 238.)

Thereafter, the case was tried before a jury at Juneau, Alaska, the jury returning a verdict of guilty on February 20, 1957. This appeal was taken from the judgment and sentence entered on February 27, 1957 based on the jury's verdict.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In denying appellants' motions for judgment of acquittal made at the conclusion of the government's

case and at the conclusion of the entire case and appellants' motion for judgment of acquittal notwithstanding the verdict and by so doing:

(a) Failing to rule that the regulation sought to be enforced was invalid due to indefiniteness.

(b) Failing to rule that the telegrams, appellants Exhibits A and B, amended the regulation sought to be enforced so as to open the Zimovia Strait area to fishing on July 12, or estopped the government from enforcing the regulation.

(c) Failing to rule that the telegrams, appellants' Exhibits A and B amended the regulation in such a manner as to make the regulation invalid for want of definiteness.

2. In failing to give appellants' Requested Instruction No. 1 as follows:

> "It appears from the evidence presented in this case that the Acting Director of the Fish and Wildlife Service at Juneau sent two telegrams shortly prior to July 12, one of which telegrams was sent to various Fish and Wildlife enforcement officers and read as follows:
>
> 'Alaska Fishery Regulation 121.3 amended to open Anan and Ernest Sound Section at six o'clock antemeridian July twelve This action taken because adequate early escapement of pink salmon assured in Anan Creek as revealed by ground survey of stream and aerial survey of approaches by FWS officials July seven Advise interested parties.'
>
> "The second telegram was sent to various fishermen and packing companies and read as follows:

'The Ernest Sound and Anan Section of the Sumner Strait District will open at 6:00 am July 12 instead of July 15 Please advise interested parties.'

"Normally a telegram does not have the force and effect of a Fisheries regulation. If, however, the defendants, in fishing in the place where they were apprehended, relied on either or both of the telegrams set forth above, the United States is estopped from denying that those telegrams are of the same effect as a regulation. Therefore, in determining whether or not defendants have been proved guilty of the offense charged beyond a reasonable doubt, the telegrams must be considered by you as a regulation amending the prior regulation 121.3—unless you find, beyond a reasonable doubt, that defendants did not rely upon such telegrams in fishing at the place where they were apprehended."

3. In giving Instruction No. 10 as follows:

"It is not necessary that the government prove that the defendants intended to fish illegally or that they knew they were fishing illegally at the time in question. It is only necessary to prove that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956."

over appellants' objection that said instruction failed to place the burden on the government to prove its case beyond a reasonable doubt. (R. 283.)

4. In withholding from the jury Exhibits A and B while permitting other exhibits to go to the juryroom. (R. 281-282.)

ARGUMENT.

I.

FISHING REGULATION 121.3 INSOFAR AS APPLICABLE TO THE SUBJECT CASE IS UNENFORCEABLE SINCE THE BOUNDARIES OF ZIMOVIA STRAIT HAVE NOT BEEN PRESCRIBED AND THE BOUNDARIES HAVE NOT BEEN MARKED ON THE GROUND.

Appellants were fishing at a point 1.4 miles northwest of Thorne Point at the time they were apprehended. They were fishing in broad daylight on a day when it was well known that Fish and Wildlife agents were in the area.

The fishing regulations do not define the boundaries of Zimovia Strait. According to the U. S. Department of Agriculture, Forest Service official map of the Tongass National Forest, Alaska, 1951, Exhibit C, the body of water designated as Zimovia Strait is a narrow neck of water northwest of the area where defendants were fishing. The area where the defendants were fishing, according to the map, appears to be in the waters of Ernest Sound rather than Zimovia Strait. Admittedly other maps are subject of a more ambiguous construction as to the boundaries of Zimovia Strait. The official map issued by the U. S. Fish and Wildlife Service (Exhibit D) does not designate the area known as Zimovia Strait at all.

Under those circumstances in view of the location where the defendants were fishing at the time they were apprehended, it is respectfully submitted that the fisheries regulation 121.3 is unenforceable as lacking in definiteness.

The Supreme Court of the United States stated in the case of *Connolly v. General Construction Co.,* 269 U.S. 385 at 391, "that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." See also *International Harvester Co. v. Kentucky,* 234 U.S. 216 at 221; *Collins v. Kentucky,* 234 U.S. 634 at 638.

In *Champlin Refining Co. v. Corp. Com. of Oklahoma,* 286 U.S. 210 at 243, the Court stated:

> "It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

See also, *United States v. Cohn Grocery,* 255 U.S. 81 at 89; *Small Co. v. American Sugar Refining Co.,* 267 U.S. 233 at 239; *Cline v. Frink Dairy Co.,* 274 U.S. 445 at 454; and *Lanzetta v. New Jersey,* 306 U.S. 451, 83 L.Ed. 888.

This same rule has been applied under similar circumstances to Alaska fishing regulations. We refer to the case of *Booth Fisheries Co. v. United States,* decided by this learned Court at 6 F. 2d 500. In that case the Booth Fisheries Company was accused of

fishing within five hundred yards of the mouth of a stream in violation of a statute making it unlawful so to fish and stating:

> "For the purposes of this section, the mouth of such creek, stream or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination."

At the trial of the case the judge instructed the jury that it was up to the jury to determine the place or location of the mouth of the creek and he instructed that the mouth of the stream emptying into tidewaters was the point or place where the waters of the stream meet tidewater at mean low tide.

This learned Court reversed the conviction stating:

> "Whether counsel is correct or not we need not inquire, but the mouth of a stream cannot be ascertained with mathematical precision, and the uncertainty of the situation demonstrates the necessity for some fixed rule on the subject. . . . But in any event the place where the mouth of the stream shall be located rests in the discretion of the Secretary of Commerce, and the location of the mouth of the stream by the Secretary is indispensable to give certainty and precision to the statute."

It is to be noted that the decision does not rest on the narrow grounds of the statutory requirement that the Secretary "determine and *mark*" the mouth of the stream, but on the basis that the "location of the mouth of the stream by the Secretary is indispensable to give certainty and precision to the statute."

Similarly in the subject case, the boundaries of Zimovia Strait without some definition being set forth in the regulation or without reference to some particular map indicating beginning and ending points, are impossible to determine and the regulation, accordingly, is fatally defective. To the same effect is the case of *United States v. Peck,* 13 Alaska 218. In that case the Secretary of Interior promulgated a regulation providing:

> "Where the closed area at the mouth of a stream has not been designated by signs erected by the Fish and Wildlife Service and where the extent of the closed area is fixed by measurement from the mouth of a stream, the mouth of such a stream shall be at a line between the extremities of its banks at mean low tide."

The late Judge Folta held that in the absence of markers being placed to designate the mouth of the stream, the regulation and statute were fatal for indefiniteness. He stated:

> "But since the line of mean low tide is itself extremely difficult, if not impossible, of determination with precision and must, therefore, remain largely a matter of guesswork, the result varying with each individual, it is obvious that the determination of the mouth of a stream will vary accordingly. Unless, therefore, the mouth as determined by the Secretary is marked, fishermen would not only not be able to determine the limits of the closed area, but the regulation itself would be lacking in that certainty which is a requisite of any penal statute and without which there can be no conviction or forfeiture."

Again it is to be noted that the decision rested on the uncertainty of the regulation rather than any statutory requirement for the Secretary to mark the stream.

It is true that in a subsequent case of *United States v. Peck,* 14 Alaska 121, a conviction was maintained for fishing within five hundred yards of the mouth of a stream where the markers had not been placed showing the mouth of the stream. The Court held:

> "It is my opinion that the presence of markers is not indispensable where those charged with the enforcement of the fisheries laws warn the violator, or he otherwise has knowledge or believes, that he is in a prohibited area. Thereafter he acts at his peril just as he does when, with markers on the shore, he underestimates the distance."

It is to be noted, however, that in that case the defendants admitted that they fished within five hundred yards of the mouth of the stream. They thus were merely attempting to rely on a technicality and it was not a situation where they were misled by the uncertainty of a regulation.

In that connection, it is to be noted that there was nothing inherently wrong with fishing at the place where appellants were apprehended. It was not at the mouth of a stream where fish congregate in schools and are thus easy victims. In fact, even under the government's interpretation of the regulations, this area would have been opened to fishing within a short time.

In the subject case, the evidence shows that the appellants thought that they were not fishing in Zimovia Strait as well as thinking that it was legal to fish in Zimovia Strait if they were fishing there. (R. 233.) Accordingly, the second *Peck* case is not applicable. Moreover, in the *Peck* case, the question was presented as to whether markers were placed to designate the five hundred yard distance from the mouth of the stream. The boat of the Fish and Wildlife Service could serve under those circumstances as a marker. In the subject case there is no starting or ending point of Zimovia Strait and the regulation falls for lack of definiteness.

The trial Court instructed the jury that,

> "It is not necessary that the government prove that the defendants intended to fish illegally or that they knew they were fishing illegally at the time in question." (R. 12.)

In an offense of this nature not dependent upon intent, it is paramount that the regulation sought to be enforced is clear so that the innocent may not be led into the commission of an offense. As indicated above, the regulation here sought to be enforced gave no definition whatsoever of "Zimovia Strait". While admittedly action of the Fish and Wildlife Service since the trial of this case should not affect this appeal, Department of the Interior Regulatory Announcement 51, Laws and Regulations for Protection of the Commercial Fisheries of Alaska, 1957, has added a section containing the very information that appellants contended should have been included in the prior regula-

tion to make it enforceable. The 1957 regulations have added a new Section 121.2a specifying:

> "(a) Anan section: Ernest Sound, Bradfield Canal, and contiguous waters excluding Zimovia Strait, northwest of a line from Thorne Point to an unnamed islet at approximately 56 degrees 06 minutes 10 seconds north latitude, 132 degrees 06 minutes west longitude."

Such a definition makes it possible for the fishermen to know what is meant by the area of Zimovia Strait excluded from the remainder of the Anan section. Merely "excluding Zimovia Strait" as specified in the 1956 regulations under which this charge was brought is so indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application".

It is further significant that generally even the regulations of 1956 gave specific reference to locations of closed waters in contrast to the regulation here sought to be enforced. See Sections: 103.12, 103.13, 104.2, 104.20, 105.2, 105.18, 107.15a, 108.23, 108.24, 109.1, 109.10, 109.15a,b,c,d,e,f,g, 109.16, 110.1, 110.12, 111.1, 111.11, 111.12, etc. Usually the clarification is by means of reference to the abutting landmarks; sometimes reference is made to longitude and latitude; and in some of the regulations the areas are specified by reference to a distance from the mouth of a stream. The mouths of streams are required to be marked and thus give a fixed reference point. In some cases, the bays themselves are marked at their entrances. It would have been a simple matter to have given bear-

ings with reference to Zimovia Strait so that the meaning of the term would be clear to the fishermen sought to be regulated. It is respectfully submitted that the failure so to do renders this regulation unenforceable.

Attempting to give definiteness to the regulation, the government, in presenting its case, referred to statements in the United States Coast Pilot, a publication of the United States Coast and Geodetic Survey, and to a chart of Ernest Sound—Eastern Passage and Zimovia Strait (Government's Exhibit 1) issued by the same survey. The regulation, however, makes no reference to any particular chart or to the Coast Pilot. Testimony indicated that fishermen and boatmen rarely used the Coast Pilot other than for purposes of ascertaining a safe anchorage. (R. 205, 213.) Moreover, the Coast Pilot is ambiguous at best in defining the area known as Zimovia Strait. This publication indicated that Zimovia Strait was "about twenty-five miles long". (R. 206, 239.) Measuring from the northern end of the strait twenty-five miles comes to a point about opposite a bay known as "Thoms Place" almost two miles to the north of the place where appellants were fishing. (R. 240-241.) The location of Thoms Place also coincides with the area proceeding from the north to the south where the body of water widens thus constituting a logical basis for concluding that it is the southerly terminus of Zimovia Strait.

In an effort to refute this point the District Attorney measured the twenty-five miles on the chart from

the point he considered to be the southern extremity of the Strait and initialed the chart. (R. 244.) The point so initialed was well below the accepted northerly end of the Strait and if the twenty-five mile area were raised so that the northern end coincided with the most southerly area that could be conceived to be the northerly boundary of the Strait, it is readily apparent that the southerly boundary of the Strait would be well north of the place where appellants were fishing. (See Government's Exhibit 1.)

It is also respectfully submitted that the evidence does not show that the appellants were fishing in Zimovia Strait. According to the official map of this area issued by the United States Forest Service, Exhibit C, Zimovia Strait does not commence until the narrowing of the waters, a considerable distance to the northwest of where appellants were apprehended. The area where appellants were apprehended appears to be a part of Ernest Sound about which there was no question as to the legality of fishing at the time of the arrest. Actually the attempt to limit the fishing could well have been intended to apply to the narrow body of water shown on the Forest Service map as Zimovia Strait, since obviously that area could be fairly well covered by a net. The area where appellants fished had the same characteristics as the broader waters of Ernest Sound. Accordingly, it is respectfully submitted that the evidence shows that the appellants were not fishing in Zimovia Strait at the time of their arrest and further that the regulation itself is fatally defective for lack of definiteness.

These objections to the validity of the regulation were timely raised by the appellants in their Motion for Judgment of Acquittal made at the conclusion of the government's case (R. 132); renewed at the conclusion of the entire case (R. 260); and by appellants' motion for Judgment of Acquittal notwithstanding the verdict. (R. 284-285.)

II.

THE TELEGRAMS SENT BY THE ACTING ADMINISTRATOR OF FISHERIES AMENDED SECTION 121.3 SO AS TO LEGALIZE FISHING IN ALL OF THE ANAN-ERNEST SOUND SECTION OF THE SUMNER STRAIT DISTRICT, INCLUDING ZIMOVIA STRAIT.

The learned trial judge refused to permit the telegrams, Appellants' Exhibits A and B, to go to the jury and instructed the jury that the only effect of the telegrams was to change the date of the opening of the season. Two telegrams were sent by the Acting Administrator of Fisheries. Exhibit A addressed to various enforcement officers stated:

> "Alaska Fishery Regulation 121.3 amended to open Anan and Ernest Sound Section at six o'clock antemeridian July twelve This action taken because adequate early escapement of pink salmon assured in Anan Creek as revealed by ground survey of stream and aerial survey of approaches by FWS officials July seven Advise interested parties."

The other telegram, Exhibit B, was addressed to various canneries and fishermen and stated:

> "The Ernest Sound and Anan Section of the Sumner Strait District will open at 6:00 am July 12 instead of July 15 Please advise interested parties."

Appellants first heard of the change in the fishing regulations by reports over their radio telephone. They later saw the telegram, Exhibit B. From what they heard as to the opening of the area involved and from the telegram they read, they believed that the Anan and Ernest Sound section including Zimovia Strait was opened on July 12. (R. 190, 235.)

Certainly the government is estopped from denying that the telegrams sent by the Acting Administrator had the effect of amending regulation 121.3 in the manner set forth in those telegrams.

That the government may be estopped in a criminal case has been well established. Thus in the case of *United States v. Lemons,* 200 F. 2d 396, the Court stated:

> "We also pointed out when the criminal design originates, not with the accused, but in the mind of government officers, and the accused is lured by persuasion, deceitful representation or inducement into the commission of a criminal act, then the government is estopped by sound public policy from prosecuting the one who commits it."

Similarly in the case of *United States v. Lynch,* 256 F. 983, the Court stated:

> "Under such circumstances the government is estopped from prosecuting on the ground that it caused and created that of which complaint is made."

While no case has been found exactly in point with reference to an administrator giving out an amendment to a regulation, it is submitted that the same principle as referred to in the above cases applies in the subject case so that the government in all good conscience was estopped from denying that the telegrams amended regulation 121.3 in the manner set forth in those telegrams.

It is true that the wording in the Federal Register had a different effect from the telegrams which were sent to the law enforcement officers and to the fishermen. The Federal Register was published on July 11, 1956. It was shown that the appellants had no knowledge of the contents of the Federal Register and that the normal means of mailing a Federal Register to Juneau, Alaska, or particularly to fishermen at Petersburg, and the smaller ports in Alaska, would take several weeks. Even by air mail the register could not have arrived by the date that the appellants were apprehended. The evidence is undisputed that the appellants relied on verbal notice and the telegrams and that they had not seen the Federal Register.

It is true that in establishing fisheries regulations the administrator of fisheries must follow the procedure set forth in the Administrative Procedure Act. It is further true that in order for a regulation to be effective when shortening the opening period, the regulation must first be published as required by 5 U.S. Code Annotated, Sections 101c, 1003. See *Hotch v. United States,* 208 F. 2d 244. This, however, does

not alter the fact that where telegrams are sent out by the Acting Administrator of Fisheries, the government is estopped from denying that those telegrams have the force and effect of an amendment to the regulation. This situation actually was particularly noted by this honorable Court when it stated in the opinion on the rehearing of the *Hotch* case at 212 F. 2d 280 at p. 284, note 15:

> "As the United States in its brief points out, there are times when the commercial fishing regulations are changed while commercial fishermen are at sea and when it would be unjust to bind them with regulations published in Washington, D. C."

Similarly, in the present case, it would certainly be unjust to bind the appellants with a regulation published in Washington, D. C.

The absurdity of the consequences of attempting to disavow the contents of the telegrams sent in the subject case may readily be appreciated. For example, a telegram could well be sent to the fishing companies and to the law enforcement agencies stating that fishing is open in the Anan and Ernest Sound Section at 6:00 a.m., July 12, when actually the regulation which would be published in the Federal Register would state that the fishing was not to open until July 13. Could the telegram be held to have no effect at all so that all fishermen who relied on it and fished on July 12 could be apprehended in the same manner that appellants were apprehended in this case?

The mere suggestion that the government should not be bound by its own actions is repulsive to a sense of decency and fair play and certainly the government is estopped from taking that position.

Section 121.3 specified that fishing in Ernest Sound and the open waters in the vicinity of Anan Creek, excluding Zimovia Strait, is prohibited except during a certain period of time commencing July 15. The exclusion of Zimovia Strait was expressly set forth in that Section. A map, being the only map of the fishing districts, regularly issued by the Fish and Wildlife Service designated the Sumner Strait district as being divided in two, the southerly part being shown as the Ernest Sound and Anan section. This portion being the Ernest Sound-Anan section includes the waters of Zimovia Strait.

The Fish and Wildlife Service sent out wires, one to the enforcement agents specifying "Alaska Fishery Regulation 121.3, amended to open Anan and Ernest Sound section at 6:00 antemeridian, July 12 . . .". It is noted that this wire did not exclude the Zimovia Strait portion of the Anan and Ernest Sound section. Accordingly, it is submitted that any reasonable person would interpret that the entire Ernest Sound and Anan section was to be opened on July 12, and such evidently was the report received by appellants.

A second wire was sent to various packing companies and fishermen. This wire stated "The Ernest Sound and Anan section of the Sumner Strait District will open at 6:00 A.M., July 12, instead of July 15." Again the wording does not exclude Zimovia

Strait and the reasonable interpretation to be placed upon the wire was that the entire Ernest Sound and Anan section was open on July 12.

It would appear that the literal interpretation of the wires leads to the inescapable conclusion that the entire Ernest Sound—Anan section without exclusion of the Zimovia Strait area was open to fishing on July 12 except as restricted by other regulations. If it could be said that there is any doubt on that question, at best the wires would present an ambiguous situation such as that specified by the Supreme Court in the case of *Connolly v. General Construction Co.,* cited supra, whereby it was stated that "a statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." The Supreme Court has often reiterated this basic assumption of American criminal law. Without a doubt, the amendment to Section 121.3 as transmitted to the fishermen either indicated that the entire Anan-Ernest Sound section was open for fishing or, when looked at in the most favorable light to the government (and a criminal statute is not so construed), it presents an ambiguous situation so vague that men of common intelligence must necessarily guess at its meaning and thus it is unenforceable insofar as the Zimovia Strait area attempted exclusion is involved.

Although this matter was brought before the learned trial judge by appellants' Motions for Judgment of Acquittal, the Court ruled that the telegrams did not

alter the regulation other than to open the area exclusive of Zimovia on July 12. While appellants took the position that as a matter of law the telegrams should be regarded as having amended the regulation so as to open all of the Anan-Ernest Sound section including Zimovia Strait to fishing on July 12, after the Court's denial of appellants' motion, a requested instruction was submitted leaving to the jury the question of whether or not appellants relied on the telegrams in fishing at the place where they were apprehended. (R. 4-5.) Certainly if appellants relied on those telegrams in fishing at the place where they were apprehended, the government should be estopped from enforcing the regulation other than amended by the telegrams. It is respectfully submitted that the trial Court erred in denying the requested instruction, as well as in failing to grant appellants' motions for judgment of acquittal.

III.

THE TRIAL COURT ERRED IN GIVING ITS INSTRUCTION NO. 10 FOR THE REASON THAT SAID INSTRUCTION FAILED TO PLACE THE BURDEN ON THE GOVERNMENT TO PROVE ITS CASE BEYOND A REASONABLE DOUBT.

The Court gave Instruction No. 10 as follows:

> "It is not necessary that the government prove that the defendants intended to fish illegally or that they knew they were fishing illegally at the time in question. It is only necessary to prove that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956."

Timely exception was taken to this instruction as follows:

> "I also except to Instruction No. 10 wherein the Court states 'It is only necessary to prove that the defendants (280) actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956' for the reason that I do not believe it is a correct statement of law, even on the theory of law on which the case is presented, and that it should state 'It is necessary to prove beyond a reasonable doubt that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956, to find the defendants guilty'."
>
> "The Court. You may have your exceptions." (R. 283.)

Although it would have been a simple matter for the Court to correct the instruction to make clear to the jury the necessity of the government to prove its case beyond a reasonable doubt, the learned trial judge refused so to do. It is well established that in a criminal prosecution, the government must prove its case beyond a reasonable doubt. It is true that the trial judge, in his Instruction No. 4, set forth the requirement that the burden of proving the offense charged beyond a reasonable doubt is on the prosecution. It is recognized that instructions must be regarded in their entirety. Nevertheless,

> "an incomplete or incorrect instruction is not cured where, when construed together with the other instructions, it is still calculated to prejudice the substantial rights of accused, and, where

> an erroneous instruction consists of a palpable misstatement of law, it is not cured by a conflicting or contradictory one which correctly states the law on the point involved, . . . Likewise, an instruction which attempts to cover the whole case, but which omits an essential element, is not cured by another covering the omitted point; . . ." (23 C.J.S. 940-941.)

These principles were recently enunciated by this honorable Court in the case of *Reynolds v. United States of America,* 238 F. 2d 460, wherein a correct statement as to the presumption of innocence of the defendant was followed by an additional statement holding in part,

> "but it is not intended to prevent the conviction of any person who is in fact guilty or to aid the guilty to escape punishment."

This Court held,

> "When this qualification is added to an instruction on the presumption of innocence, the result is to leave matters about where they would have been had no instruction on the presumption been given."

To the same effect in the subject case by stating that it was "*only* necessary to prove that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956", the trial Court left matters about where they would have been had no instruction on the burden of proof been given.

This matter is discussed in the case of *State v. Brady,* decided by the Supreme Court of North Carolina, October 14, 1953, 238 N.C. 404, 78 S.E. 2d 126, wherein the Court stated,

> "III. The third question challenges portions of the charge particularly the concluding instruction in respect to the possession of whiskey at the time here charged, that 'if the State has satisfied you upon all the evidence in this case that he had it there for the purpose of sale, then, gentlemen, you should return a verdict of guilty.'
>
> "The vice pointed out in the instruction is the degree of proof, that the jury be 'satisfied', instead of the correct degree 'satisfied beyond a reasonable doubt'.
>
> "In this connection it is true that in some other portions of the charge the correct rule is given. Nevertheless, where the court charges correctly in one part of the charge, and incorrectly in another, it will be held for error, since the jury may have acted upon that which is incorrect."

See also *State v. Brady,* 238 N.C. 407, 78 S.E. 2d 129; *Drossos v. United States* (8 Cir.), 2 Fed. 2d 538; *McRae v. People,* 71 P. 2d 1042, 101 Cal. 155; *State v. DiAngelo,* 13 N.E. 2d 909, 133 Ohio State 362; *State v. Vliet,* 197 Atl. 894, 120 N.J. Law 23; *Sullivan v. State,* 171 S.W. 2d 353, 146 Tex. C.R. 79.

In another case originating in the District Court for the District of Alaska this learned Court has ruled on the almost identical issue presented in the subject case. The decision in the case of *De Groot v. United States,* 78 F. 2d 244 at 253, holds

"The burden of proof with regard to self-defense was far from being made clear to the jury in the instructions given by the court in the instant case, and appellant's assignment of error as to the second instruction is well taken. In his first instruction the judge charged the jury that they must find the existence of malice and intent to kill beyond a reasonable doubt. In the fifth instruction the jury were told that the government must prove every material averment of the indictment to their satisfaction beyond a reasonable doubt. Nowhere is reasonable doubt mentioned in connection with self-defense. On the contrary, in the second instruction concerning self-defense the Court stated: 'The question is not whether the jury believes that the defendant had no safe or apparently safe means of protecting himself from death or great bodily harm, but whether the jury believes that the accused believed, and had reasonable grounds to believe, that he had no safe or apparently safe means of escape', etc.

"From the words, 'whether the jury believes', it could infer that its belief must be upon a preponderance of the evidence, whereas it was required to believe beyond a reasonable doubt that De Groot had a safe or apparently safe means of protecting himself, etc."

It is respectfully submitted the learned trial judge in the subject case erred in instructing the jury that it was *"only"* necessary to prove the fishing in Zimovia Strait since this specific instruction could well have been construed by the jury as authorizing a verdict of guilty even though government had not

proved "beyond a reasonable doubt" that the defendants had fished in Zimovia Strait.

IV.

THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE EXHIBITS A AND B TO BE TAKEN TO THE JURY ROOM WITH OTHER EXHIBITS IN THE CASE.

At the request of the government, the trial Court refused to permit Exhibits A and B, the telegrams referred to above, to be taken to the jury room with the other exhibits in the case. Appellants duly objected to this exclusion. (R. 281-282.) While it is admitted that generally a trial judge has discretion as to whether the jury upon retiring should take with it the exhibits in the case, the general rule appears to be that all of the exhibits should be taken or all should be withheld. Otherwise, the jury might well conjecture as to the reason for the withholding of certain of the exhibits with possible unfavorable results to the party submitting the exhibits withheld.

Thus in the case of *Chetwood v. Philadelphia and R. Ry. Co.,* 109 Atl. 645, 266 Pa. 435, it was held error for the trial Court to withhold from the jury a photograph and plan of the place of an accident which had been admitted in evidence. The Court stated:

> "When such exhibits are put into evidence they become a part of the case, and it is the uniform practice to give them to the jury during their deliberations."

See also: *Norecka, to use of Petranskas v. Pa. Indemnity Corp.,* 5 Atl. 2d 619, 135 Pa. Super. 474; *Foster v. Smith,* 16 So. 61, 104 Ala. 248.

CONCLUSION.

The regulation excluding Zimovia Strait from the area opened to fishing was too indefinite to be enforceable since no boundaries or references as to the location of Zimovia Strait were set forth. This is particularly true in an offense such as the one charged which does not involve any criminal intent.

The telegrams, Exhibits A and B, which constituted the only notice to fishermen, opened the entire Anan-Ernest Sound section which included the area where appellants were fishing, or, in the alternative, were so ambiguous as to make the attempted exclusion of Zimovia Strait unenforceable.

The trial Court by its Instruction No. 10 erroneously set forth the requirements as to burden of proof so as to deprive the appellants of their right to have the government prove its case beyond a reasonable doubt, and the learned trial judge also erred in refusing to permit the telegrams, Exhibits A and B, to go to the jury with other exhibits introduced in the case.

The trial Court instructed the jury that it was unnecessary for the government to prove that the appellants intended to fish illegally. Before one who has no criminal intent is to be convicted of a crime,

the offense should be spelled out more clearly than in the subject regulation and telegrams, and the rights of the appellants as to burden of proof beyond a reasonable doubt should be jealously safeguarded. It is, accordingly, respectfully submitted that the judgment and sentence rendered below should be reversed.

Dated, Juneau, Alaska,
November 8, 1957.

FAULKNER, BANFIELD & BOOCHEVER,
By R. BOOCHEVER,
Attorneys for Appellants.

(Appendix Follows.)

Appendix

Exhibits	Identified	Offered	Received in Evidence
Government 1	R. 44, R. 76	R. 76	R. 76
Defendants' A and B	R. 62	R. 48 to R. 60 R. 62-63	R. 63
Defendants' C	R. 112	R. 116	R. 116
Defendants' D	R. 147	R. 147	R. 147

No. 15,720

IN THE

United States Court of Appeals

For the Ninth Circuit

THOMAS B. RUSTAD, HARVEY R. WYBORNY, HOMER C. SKELLEY, CHARLES DIVEN and JAMES JOHNSON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLEE.

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No. 15,720

IN THE

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For the Ninth Circuit

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellants were convicted after a jury trial and a verdict of guilty in the District Court for the District of Alaska, First Judicial Division, at Juneau, the Honorable Raymond J. Kelly presiding, of the offense of illegal commercial fishing. Appellant Rustad was fined $1,500.00, each of the other appellants were fined $750.00, and proceeds from the sale of certain fish found aboard the vessel used by the appellants in the commission of the offense were forfeited. Appellants

filed notice of appeal from the judgment and sentence imposed by the court.

Jurisdiction below was based on 48 U.S.C. §101, and in this court is based on 28 U.S.C. §1291.

STATEMENT OF CASE.

Appellants were convicted of fishing commercially for salmon in an area which the court below ruled was closed to commercial fishing at the time in question, which was about 12:30 p.m., July 12, 1956. The place where the appellants were found fishing by the enforcement officers of the U. S. Fish and Wildlife Service was approximately 1.4 miles northwest of Thorns Point on Wrangell Island in the First Judicial Division of Alaska. The place of fishing was close to the shore of Wrangell Island and in the body of water lying between Wrangell Island and Etolin Island, which the Government contended and the jury found to be a part of the waters of Zimovia Strait.

The trial of the case revolved around two main questions:

(a) *Whether Zimovia Strait was an area closed to commercial fishing on July 12, 1956.* This issue was determined by the court, which found as a matter of law that the area was a closed one by virtue of 48 U.S.C. §222 and the Alaska Commercial Fishing Regulations (50 C.F.R., Ch. 1, Sub-Ch. F), 1956, §121.3 and 121.4, as amended by a publication in the Federal Register of July 11, 1956, which read as follows:

"1. §121.3 is amended in text by deleting 'July 15' and substituting in lieu thereof 'July 12'."

The court found that neither the amendment in the Federal Register nor the telegrams sent out by the Administrator of Commercial Fisheries (Defendants' Exhibits A and B, quoted in full at page 3 of appellants' brief) resulted in Zimovia Strait being opened to fishing.

(b) *Whether appellants were in fact fishing in Zimovia Strait.* The Government produced evidence of the time and place of the violation (R. 39-46, 72-74, 79-80), evidence that the term "Zimovia Strait" has a common ascertainable meaning and that the place where appellants were fishing is within Zimovia Strait (R. 77-78, 80-82, 92-97, 100-111, 117-120, 121-124). The jury by its verdict found that appellants were fishing in Zimovia Strait at the time in question.

SUMMARY OF ARGUMENT.

I. Fishing Regulation 121.3 is enforceable and not void for vagueness or indefiniteness as contended by appellants. There is no legal requirement that the boundaries of Zimovia Strait be prescribed and marked as contended by appellants.

(a) Regulation 121.3 is not void for vagueness.

(b) There is no need that the boundaries of Zimovia Strait should be marked.

II. The telegrams sent by the Acting Administrator of Commercial Fisheries did not amend §121.3 so as

to legalize fishing in Zimovia Strait. There is nothing in the contents of those telegrams which would constitute an estoppel of the prosecution of this case.

III. There was no error in giving Instruction No. 10. The instructions were adequate and balanced.

IV. The refusal to let Exhibits A and B be taken to the jury room was entirely proper.

ARGUMENT.

I. FISHING REGULATION 121.3 IS ENFORCEABLE AND NOT VOID FOR VAGUENESS OR INDEFINITENESS AS CONTENDED BY APPELLANTS. THERE IS NO LEGAL REQUIREMENT THAT THE BOUNDARIES OF ZIMOVIA STRAIT BE PRESCRIBED AND MARKED AS CONTENDED BY APPELLANTS.

(a) Regulation 121.3 Is Not Void for Vagueness.

The Government agrees with appellants that regulations, the violation of which imposes criminal punishment, must be sufficiently explicit to inform the public what conduct is prohibited. But the cases cited by appellants are hardly applicable to the case at bar. Most of them involve economic regulatory statutes of sweeping effect, which contained expressions so broad and lacking in precision that no notice was given to the violator of the conduct allowed or proscribed. Here appellants only had to forbear fishing in Zimovia Strait.

In *Connally v. General Construction Co.,* 269 U.S. 385 (1926), cited by appellants, the court, in noting that no precise test can be formulated to separate the

unconstitutionally vague from the constitutionally definite in statutory language, said:

> "But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them (citing cases), or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, (citing cases) or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co.,* 225 U.S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' " 269 U.S. 391.

In *Champlin Refining Co. v. Corp. Com. of Oklahoma,* 286 U.S. 210 (1932), cited by appellants, the court held void certain provisions of the Oklahoma "Curtailment Act" regulating oil production because of the failure of the statute to define the term "waste". The reason for so deciding was that:

> "The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty." 286 U.S. 242.

In *Lanzetta v. New Jersey,* 306 U.S. 444 (1939), cited by appellants, the term "gang" without further definition rendered a criminal statute void for vagueness.

Exhibits A and B, and not the Federal Register publication, constituted the amendment to Regulation 121.3, it is not true that the wording of either of those telegrams would result in Zimovia Strait being open to fishing on July 12, 1956.

The gist of appellants' argument is that because the message set forth in Exhibits A and B did not in terms exclude Zimovia Strait from the opening of the Anan and Ernest Sound section, the telegram had the effect of opening Zimovia Strait.

In Regulation 121.3 Zimovia Strait is excluded from Ernest Sound and the open waters in the vicinity of Anan Creek so that there will be no doubt that it is subject to the dates set forth in Regulation 121.4. By that mode of regulation Zimovia Strait is not part of the Ernest Sound and Anan section. Rather it is part of the general area defined as the Sumner Strait district in Regulation 121.2, the season for which is set forth in Regulation 121.4. Therefore, it would not be reasonable for a person to conclude on reading the telegram, Exhibit B, that it had the effect of opening Zimovia Strait, as that strait had an entirely separate season from Ernest Sound and the waters in the vicinity of Anan Creek.

By the interpretation the appellants seek to place on the telegrams all closed areas within the Ernest Sound and Anan section would be open, whether they were closed areas at the mouths of salmon streams or areas permanently closed by Regulation 121.11. None of those closed areas are mentioned in the telegrams, and so, by parity of reasoning, they too must

be open if Zimovia Strait is open. Surely this court will not adopt such an unreasonable construction.

It is clear from the context of the telegrams that it was the time of opening set forth in Regulation 121.3 that was being amended and nothing else. Exhibit B, which appellants claim they relied on, says:

> "The Ernest Sound and Anan Section of the Sumner Strait District will open at 6 A M July 12 *instead of July 15* Please advise interested parties." (Emphasis supplied.)

The use of the words "instead of July 15" makes the purpose of the amendment abundantly clear. It is difficult to see how ambiguities can be conjured up from language of that sort. If appellants' argument is correct it would put the U. S. Fish and Wildlife Service in a situation where it could inform fishermen of regulatory changes only at the peril of the most contorted and extreme interpretations that individual fishermen might wish to place on the information given them.

Appellants cite several cases on estoppel of the Government, but it should be noted that these are cases of entrapment. In the instant case there is nothing to show that the government planted the seed of criminality or in any way induced the appellants to fish unlawfully. Perhaps, if the telegrams were truly misleading, e.g., if they contained a mistake in the time of opening of the season, the Government would not be able to prosecute for the violations that ensued. But that is not the case here. There was nothing ambiguous about the text of the messages, as related

above. If there were an ambiguity, or if appellants felt there were one, they could have taken measures to learn the true state of affairs instead of fishing first and finding out later.

The actual amendment to Regulation 121.3 is that contained in the Federal Register of July 11, 1956. But assuming that the telegrams issued by the U. S. Fish and Wildlife Service bind the Government, the court below correctly interpreted those messages as changing only the time of opening set forth in that section.

III. THERE WAS NO ERROR IN GIVING INSTRUCTION NO. 10. THE INSTRUCTIONS WERE ADEQUATE AND BALANCED.

The instructions to the jury (R. 9-21) were ample, concise and balanced. Appellants seek to predicate error on the language of Instruction 10 on the ground that it failed to place the burden on the prosecution of proving the offense beyond a reasonable doubt. The court, however, must examine the charge as a whole in the light of the factual situation disclosed by the record and should not single out any one instruction by itself. *Hertzog v. U. S.,* 9th Cir., 235 F. 2d 664; *Finn v. U. S.,* 9th Cir., 219 F. 2d 894, cert. den. 349 U.S. 906; *Wolcher v. U. S.,* 9th Cir., 218 F. 2d 48, cert. den. 350 U.S. 982 reh. den., 350 U.S. 905.

In the instant case the court defined the presumption of innocence in Instruction 3, clearly placed the burden of proving the offense beyond a reasonable doubt on the Government in Instruction 4, and defined reasonable doubt in Instruction 5. In Instruc-

tion 9 the court defined what was meant by "fishing", and then went on in Instruction 10 to point out to the jury that guilty knowledge or intent to fish illegally was not an element in the case. In so instructing them the court had to make it clear that it was only necessary for the Government to prove actual fishing in contrast to fishing with a criminal intent, and had the court not so instructed the jury they might have been troubled by that question in their deliberations. When the instructions in this case are read together it will be seen that they are fair, that they follow logically one from the other, and that they give a plain and intelligible exposition of the applicable law.

In Instruction 18 the jury was told to consider the instructions as a whole and not to single out any one particular instruction and consider it alone. It must be presumed that the jury took care to do its duty in this regard, and that they did not follow any one of the instructions by lifting it out of its context and ignoring the others.

Appellants urge *State v. Brady,* 78 S.E. 2d 126 (N. Car. 1953), as authority that Instruction 10 in the instant case was defective. It should be noted that the North Carolina court found error in the admission of certain testimony independently of the instruction given. The instruction declared bad by that court used the words "if the State has satisfied you upon all the evidence", whereas in the case at bar the court used the term "prove". The court had already instructed the jury about the burden of proof

so it is hard to see how they could have been led astray as to the meaning of the word.

In *De Groot v. U. S.,* 78 F. 2d 244, cited by appellants, the court was considering a murder case involving complicated elements and facts and felt that the instructions applied to the case as a whole were inadequate. As in many areas of the law, there is no simple formula for determining the adequacy of the instructions in any particular case.

The better approach is that the court need not ritualistically repeat the phrase "reasonable doubt", or reiterate it in each sentence, if the jury is properly instructed once. Thus in *Peters v. U. S.*, 160 F. 2d 319 (C.A. 8th 1947), cert. den. 331 U.S. 825, the defendant was convicted of violating the National Cattle Theft Act, 18 U.S.C. §419(b). Defendant's counsel asked the court to give a supplemental clarifying instruction, and the court instructed the jury that ". . . before you may find the defendant guilty in the case you must find that the cows . . ." were the property of the victim. On appeal defendant raised the failure to recite "beyond a reasonable doubt" in that instruction. The court said:

> "The obvious answer to defendant's argument on this point is that when all parts of the instruction are read together the criticism fails for want of substance. The instruction upon the burden of proof resting upon the Government is complete and correct. One part of an instruction cannot be separated and considered apart from the whole. *Kortz v. Guardian Life Ins. Co.,* 10th Cir., 144 F. 2d 676. The court in the charge given to

the jury said that the burden was 'upon the Government to prove, beyond a reasonable doubt, every material allegation of the indictment.' The essential elements of the indictment were then outlined and the term 'reasonable doubt' carefully defined. In the supplemental instruction given in the instance of defendant's counsel the court by reference thereto amended the statement of the essential elements of the indictment, each of which the jury had already been told must be established by the Government beyond a reasonable doubt. When the whole instruction including the supplemental instruction, supra, is considered there can be no doubt that the jury understood that ownership of the stolen cattle was required to be established by the same degree of proof necessary to establish all other essential elements of the indictment." 160 F. 2d at 321.

In *Crawford v. U. S.*, 195 F. 2d 472 (C.A. 3d 1952), the defendant was convicted of possessing goods stolen from an interstate shipment. The court had instructed that the jury should return a verdict of guilty if "satisfied" that the Government had proved the elements necessary for conviction. Defendant took exception to this, but the court held:

"Reading the charge as a whole, however, we believe that the trial judge did properly outline the requirement that the proof of the Government had to be beyond a reasonable doubt, and that the jury was aware of the quantum of proof needed particularly since the court introduced the challenged remarks with the clause '. . . and you will deliberate under the laws I have laid down.'" 195 F. 2d at 475.

In a case of this sort, involving a simple fact situation and relatively simple instructions, it would seem needless and perhaps even confusing to the jury to mention reasonable doubt throughout all parts of the instructions. As the court said in *Orton v. U. S.*, 221 F. 2d 632 (C.A. 4th 1955), cert. den. 350 U.S. 821:

> "Jurors should be given credit for having ordinary intelligence; and if there is one doctrine of the criminal law which they probably understand better than any other it is the presumption of innocence and the burden resting upon the prosecution to establish guilt beyond a reasonable doubt." 221 F. 2d at 635.

IV. THE REFUSAL TO LET EXHIBITS A AND B BE TAKEN TO THE JURY ROOM WAS ENTIRELY PROPER.

At the close of the case the Government asked that Exhibits A and B not be taken to the jury room, and the court granted this request. The court had already ruled that the telegrams did not create an estoppel against the Government, that they could not be interpreted as opening Zimovia Strait to fishing on the date in question, and that the jury would be instructed as to their meaning. Thus those two exhibits could have no evidentiary value to the jury, and would only serve to confuse them in their deliberations. The cases cited by appellants are obviously distinguishable on their facts as they are civil suits involving situations where the exhibits did have a material bearing on the fact issues of the case. Each of those cases recognizes that the matter is within the sound discretion of the court.

There is ample Federal authority that in criminal cases the taking of exhibits to the jury room is within the court's discretion. *Buckner v. U. S.*, 154 F. 2d 317 (Ap. D.C. 1946); *Goins v. U. S.*, 99 F. 2d 147 (C.C.A. 4th 1938).

CONCLUSION.

Appellants have had a trial free from error, the court's rulings below were sound, and the jury which found the appellants guilty was correctly instructed on the applicable law. It is respectfully submitted that the judgment and sentence below should be affirmed by this court.

Dated, Juneau, Alaska,
January 4, 1958.

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JEROME A. MOORE,
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Attorneys for Appellee.

No. 15722

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH D'AGOSTINO, Claimant, of ONE 1957 LINCOLN PREMIERE TWO-DOOR HARDTOP COUPE, MOTOR NO. 57WA5592L, its tools and appurtenances,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FOR THE NINTH CIRCUIT

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The United States District Court had jurisdiction to render its judgment in the action entitled *United States of America v. One 1957 Lincoln Premiere* 2-door hardtop Coupe, Motor No. 57WA5592L, its tools and appurtenances, Civil No. 389-57 Y, pursuant to the authority contained in Title 28, United States Code, Section 1355. There is no dispute that the libeled automobile and the appellant are within the Central Division of the Southern District of California.

This court has jurisdiction of this appeal from the Findings of Fact, Conclusions of Law and Final Judgment of the District Court in favor of the appellee and against the appellant ordering the said 1957 Lincoln

Premiere 2-door hardtop Coupe, Motor No. 57WA5592L, its tools and appurtenances, condemned and forfeited to the United States of America. Under the provisions of Title 28, United States Code, Sections 1291 and 1294(1) said judgment and order was a final decision of the District Court.

Statutes Involved.

Title 26, United States Code:

"Section 4401. Imposition of tax.

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 525."

Title 26, United States Code:

"Section 4411. Imposition of tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax

under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527."

"Title 26, Section 4412. Registration.

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527."

"Title 26, U. S. C., Section 7302. Property used in violation of internal revenue laws.

It shall be unlawful to have or possess any property intended for use in violating the provisions of

the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 867."

Statement of the Case.

This is an appeal from a decision of the District Court condemning and forfeiting One 1957 Lincoln Premiere 2-door hardtop Coupe, Motor No. 57WA5592L, its tools and appurtenances, to the United States of America for its use by the appellant, Joseph D'Agostino, in, and as an active aid to, his wagering business in violation of the internal revenue laws concerning wagering; to-wit: Sections 4411 and 4412 of Title 26, United States Code.

Appellant is the claimant and the legal and registered owner of the subject Lincoln automobile. The evidence as later discussed, shows that appellant used the vehicle in, and as an active aid to, his wagering business, which business he was conducting prior to and up until February 28, 1957, so as to subject the car to forfeiture. Appellant has never filed an application for a wagering

permit nor has he ever paid his wagering occupational tax. Also, he has never registered with the official in charge of the internal revenue district as a person required to pay a special tax pursuant to Section 4412 of Title 26, United States Code.

On or about February 28, 1957, duly authorized and acting investigators of the Intelligence Division, Internal Revenue Service, Treasury Department of the United States, seized the said 1957 Lincoln automobile in the City of Los Angeles, County of Los Angeles, State of California. Thereafter, the Government filed its Libel of Information wherein it alleged the illegal use of the vehicle by appellant in his wagering activities which subjected the car to condemnation and forfeiture.

The appellant filed an Answer to the Government's Libel. After the conclusion of the trial the District Court gave judgment in favor of the Government and ordered the condemnation and forfeiture, to the United States, of the 1957 Lincoln Premiere 2-door hardtop Coupe, Motor No. 57WA5592L, its tools and appurtenances.

Appellee is unable to cite pages of a Transcript of Record since none was printed. It is appellee's understanding that appellant had permission to proceed on a typewritten Transcript of Record. However, appellee has only received a copy of the Reporter's Transcript of Proceedings in the District Court and we do hereinafter refer this court to page references in that Transcript. It appears that appellant has never filed a Designation of Record on Appeal nor a Statement of Points upon which he intends to rely on appeal in this court and we submit this Appellee's Brief in reply to Appellant's Opening Brief without benefit of those items.

Summary of Argument.

I.

THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS THAT THE 1957 LINCOLN PREMIERE TWO-DOOR HARDTOP COUPE, MOTOR NO. 57WA5592L, ITS TOOLS AND APPURTENANCES, WAS USED BY APPELLANT, JOSEPH D'AGOSTINO, IN RECEIVING WAGERS AND AS AN ACTIVE AID TO AND FACILITATION OF HIS WAGERING BUSINESS.

II.

THE JUDGMENT IS NOT CONTRARY TO LAW BECAUSE THE USE BY APPELLANT, JOSEPH D'AGOSTINO, OF THE SEIZED AUTOMOBILE TO RECEIVE WAGERS AND TO AID AND FACILITATE HIS WAGERING BUSINESS, COMES WITHIN THE MEANING OF SECTION 7302 OF THE INTERNAL REVENUE CODE, WHICH SUBJECTS AN AUTOMOBILE TO FORFEITURE WHEN IT IS, . . . "INTENDED FOR USE IN VIOLATING . . . THE INTERNAL REVENUE LAWS . . . OR WHICH HAS BEEN SO USED . . ."

III.

SECTION 7302 OF THE INTERNAL REVENUE CODE, ON ITS FACE AND AS CONSTRUED AND APPLIED IN THIS CASE, IS CONSTITUTIONAL AND FULLY WITHIN THE CONTEMPLATION OF ARTICLE I, SECTION VIII OF THE UNITED STATES CONSTITUTION: TO-WIT: THE POWER OF CONGRESS TO LAY AND COLLECT TAXES AND TO MAKE ALL LAWS WHICH SHALL BE NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THAT POWER.

ARGUMENT.

I.

The Evidence Supports the Trial Court's Finding That the 1957 Lincoln Premiere Two-Door Hardtop Coupe, Motor No. 57WA5592L, Its Tools and Appurtenances, Was Used by Appellant, Joseph D'Agostino, in Receiving Wagers and as an Active Aid to and Facilitation of His Wagering Business.

The evidence introduced at the trial of this case clearly shows that Joseph D'Agostino was a gambler and a bookmaker, and that he was professionally engaged in the business of receiving wagers. He engaged in his bookmaking activities without filing an application for a wagering permit and without paying the wagering occupational tax. It was stipulated that Mr. D'Agostino did not possess a Federal Wagering Tax Stamp. [R. 3.]

Officers of the Los Angeles Police Department testified that on or about February 27, 1957, they were in the process of raiding a bookmaking "spot" located at 2602 West Grand Avenue in the City of Alhambra, California. During the course of this raid the telephone at that address rang and it was answered by officer Joseph S. Deiro. The person on the phone identified himself as "Joe" to officer Deiro. The officer advised "Joe" of the raid and arrests at that address and the person on the telephone suggested a meeting with the officer at a 76 Gasoline Station at Fremont and Main Street in Alhambra. The officer went to that location and there met the appellant, Mr. Joseph D'Agostino. Mr. Joseph D'Agostino had the Lincoln automobile, which is now in question, with him at that time. During this meeting the appellant and the officer engaged in conversation in which appellant

requested the "owe-sheets" and "betting markers," or a copy thereof, which were seized during the raid of the bookmaking "spot" on West Grand Avenue in Alhambra. Appellant was told by the officer that he would get the "owe-sheets" and the "betting markers" and allow the appellant to copy them at another time. They arranged to meet the following day at a drive-in restaurant at Sunset Boulevard and Vermont Avenue in Hollywood, California. When the appellant left the officer he gave him $100.

On the following day, February 28, 1957, at approximately 3:30 p.m. officer Deiro, accompanied by officer Charles M. Holmes, met the appellant at the aforementioned drive-in. The appellant drove the subject Lincoln automobile. During this meeting the appellant was told that they could not give him the "sheets" but they did offer to let him copy them. Appellant then and there did copy the various betting sheets. During this meeting the officers had a conversation with him regarding his bookmaking activities in which he admitted engaging in bookmaking.

On February 28, 1957, appellant went to the offices of the Administrative Vice Detail of the Los Angeles Police Department located at 150 North Los Angeles Street in the City of Los Angeles. Present there were the appellant (Mr. Joseph D'Agostino) Sergeant Ira B. Dole, Sergeant Lievan, and officer Deiro. While there, the appellant engaged in a conversation with these officers. [R. 83-111.] Appellant admitted to the officers that he was engaged in the bookmaking business and that he would use his Lincoln automobile to go around to his bettors several times a week to make collections and payoffs on various wagers he had received from them. [R. 104-105.]

When the appellant was on the stand [R. 38] he admitted he owned no other automobile aside from the subject Lincoln automobile. During cross-examination [R. 63] he denied that he was a bookmaker and denied parts of the conversation which occurred at the offices of the Administrative Vice Detail of the Los Angeles Police Department. A comparison of his testimony and of the transcript of the recording, which we played into evidence, indicates that the appellant lied while on the stand as to these details.

The conversation which took place in the offices of the Administrative Vice Detail of the Los Angeles Police Department conclusively shows that Mr. Joseph D'Agostino was a person who engaged in the business of receiving wagers and that he used the subject Lincoln automobile as an active aid to and facilitation of that business. The appellant admitted that he never possessed a Federal Wagering Tax Stamp and, therefore, his activity in receiving wagers was in violation of the internal revenue laws requiring it. To-wit: Sections 4411 and 4412 of the Internal Revenue Code.

Mr. D'Agostino lied about the use of the car by him in his wagering activities while he was on the stand and from that fact we can only draw one inference, and that is, that the truth lies directly opposite to the way he testified, namely, that the car *was used* by appellant in his business of receiving wagers and as an active aid to and facilitation of that wagering business.

The entire record clearly shows that the appellant did, in fact, use his 1957 Lincoln automobile in his business of receiving wagers and as an active aid to and facilitation of that wagering business when he, the appellant, was not

possessed of a Federal Wagering Tax Stamp as required by the Internal Revenue Code.

Therefore, the evidence conclusively supports the trial court's findings that the 1957 Lincoln automobile, its tools and appurtenances, was used by Joseph D'Agostino in receiving wagers and as an active aid to and facilitation of his wagering business.

II.

The Judgment Is Not Contrary to Law Because the Use by Appellant, Joseph D'Agostino, of the Seized Automobile to Receive Wagers and to Aid and Facilitate His Wagering Business Comes Within the Meaning of Section 7302 of the Internal Revenue Code, Which Subjects an Automobile to Forfeiture When It Is ". . . Intended for Use in Violating . . . the Internal Revenue Laws . . . or Which Has Been so Used . . ."

The types of uses to which Mr. D'Agostino put the subject vehicle have been held to be within Section 7302 of Title 26, United States Code, so as to justify seizure and forfeiture of the vehicle. In the case of *United States v. One 1953 Oldsmobile Sedan,* 132 Fed. Supp. 14, the court held that where the evidence established that the owner of the vehicle was engaged in the business of accepting wagers without having paid a special tax, and was using his automobile in that business, the Government was entitled to a decree of forfeiture. In that case the car was used to keep in contact with the persons who made the wagers and on the days following certain wagers the bookmaker would call upon his customers. If the bettor won the wager then the bookmaker would pay and if the bettor lost the wager then the bettor would make the pay-off to the bookmaker. In other words, the bookmaker

used the vehicle to make his collections and pay-offs and in that case the court found that such a use was within the meaning of Section 7302. It is interesting to note that upon a careful reading of the *Oldsmobile* case we find a use which exactly parallels the use made of the Lincoln automobile by Mr. D'Agostino in the instant case.

It has further been held that Section 7302 of the Internal Revenue Code is a broad Section and should not be narrowly construed.

> *United States v. General Motors Acceptance Corporation* (C. A. 5), 239 F. 2d 102.

In the *General Motors Acceptance* case Judge Reeves, in delivering the opinion of the Fifth Circuit, said:

> ". . . It is urged that 'Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.' United States v. One 1936 Model Ford V-8 De Luxe Coach, 307 U. S. 219, 226, 59 S. Ct. 861, 865, 83 L. Ed. 1249. As noted in the same opinion, however, 'The point to be sought is the intent of the law-making powers.' In an earlier case, the Supreme Court had said:
>
> 'We are not called upon to give a strained interpretation in order to avoid a forfeiture. Statutes to prevent fraud on the revenue are construed less narrowly, even though a forfeiture results, than penal statutes and other involving forfeitures.' United States v. Ryan, 284 U. S. 167, 172, 52 S. Ct. 65, 67, 76 L. Ed. 224. See, also Manufacturers Acceptance Corporation v. United States, 6 Cir., 193 F. 2d 622.
>
> It is said that we should construe §7302 with especial strictness since 18 U. S. C. A. §3617, providing for remission or mitigation of forfeitures, has

reference only to the liquor tax laws. Available, however, are the compromise powers of the Secretary of the Treasury and the Attorney General, which formerly provided the procedure to afford relief to innocent owners in liquor tax cases. United States v. One 1936 Model Ford V-8 De Luxe Coach, supra.

The gist of the offense is said to be the failure to pay the tax, and the truck was not used in failing to pay the tax. Section 7302 requires only that the vehicle be used or intended for use 'in violating the provisions of the internal revenue laws.' One of the acts going to constitute such violation was the engaging in the business of receiving wagers especially when, as here alleged, that was done 'with intent to defraud the United States of the wagering occupational tax.' A like contention has not prevailed in liquor tax cases. One Ford Tudor Automobile, etc. v. United States, supra; United States v. Ganey, supra; Jarrett v. United States, 4 Cir., 184 F. 2d 532; Shively v. United States, 4 Cir., 210 F. 2d 131.

Finally, it is insisted that, while §7302 of the 1954 Code broadens the scope of §3116 of the 1939 Code, it should be confined to cases involving a commodity upon which a tax is imposed, that the truck itself must in some way be guilty. See Goldsmith, Jr.-Grant Co. v. United States, 254 U. S. 505, 510, 511, 41 S. Ct. 189, 65 L. Ed. 376; United States v. One 1948 Plymouth Sedan, 3 Cir., 198 F. 2d 399; United States v. Lane Motor Co., 344 U. S. 630, 73 S. Ct. 459, 97 L. Ed. 622. In the last cited case, the Supreme Court held 'that a vehicle used solely for commuting to an illegal distillery is not used *in* violating the revenue laws.' 344 U. S. at page 631, 73 S. Ct. at page 460. The rule is different, however, where the vehicle is used not merely for the convenience of

the operator in commuting, but also as an active aid in violating the revenue laws, even though not for the transportation of any commodities subject to seizure. United States v. One 1952 Lincoln Sedan, 5 Cir., 213 F. 2d 786; One Ford Tudor Automobile, etc. v. United States, supra; United States v. Ganey, supra; Jarrett v. United States, supra; Shively v. United States, supra. Cf. United States v. Jones, 5 Cir., 194 F. 2d 283.

The plain language of §7302 covers a truck used and intended for use in violating the wagering tax laws. The judgment is therefore reversed and the cause remanded for further proceedings consistent with this opinion."

Since Section 7302 of the Internal Revenue Code is, in its plain reading, a very broad statute, such use of a vehicle as was shown and found in this case falls clearly within its meaning and subjects the vehicle to forfeiture. The clear intention of Congress in the passage of such a broad Section appears to be to double and increase the penalties involved in violations of the Internal Revenue Act so as to discourage persons who engage in such violations. As was pointed out by the trial court, in its oral opinion [R. 121-124], it is because many of us are adverse to seeing multiple penalties piled up that we overlook the fact that it is a recognized procedure to discourage certain particular activities. It is not the duty of courts to change this procedure by way of judicial legislation but is a policy matter solely within the discretion of Congress.

In this case, we have clear Findings of Fact by the District Court as to the use of the 1957 Lincoln automobile by Mr. D'Agostino in receiving wagers and as an active aid and facilitation to him in his bookmaking busi-

ness. It is a well-recognized principle that a trial judge's findings of fact are never to be lightly disturbed by a reviewing court. Generally, appellate courts will not overturn findings of fact of the trial judge, since he has had the opportunity to hear and see the witnesses. The trial judge's findings must be given great weight and should be binding, unless clearly based on an obvious error of law or a serious mistake or misconception of a fact.

Standard Oil Company v. Shipowners' and Merchants' Tugboat Company, 17 F. 2d 366 (C. A. 9);

National Surety Company v. Globe Grain and Milling Company, 256 Fed. 601 (C. A. 9);

Woodbury, et al. v. City of Shawnee Town, 74 Fed. 205 (C. A. 7);

Fidelity and Casualty Company of New York v. Phelps, et ux., 64 F. 2d 233 (C. A. 4).

There is no contention that violations of Sections 4411 and 4412 are not violations of the internal revenue laws and since these sections are part of the Internal Revenue Code, as passed by Congress, any violations of them would invoke the operation of Section 7302, of the Internal Revenue Code.

One of the leading cases involving a vehicle seized for violating Section 7302 of Title 26, United States Code, was the case of *United States v. Lane Motor Company,* 344 U. S. 630. In that case the United States Supreme Court held that "a vehicle used *solely* for commuting to an illegal distillery is not used in violating the internal revenue laws," (at p. 631). The *Lane Motor Company* case apparently implies that where the vehicle was used for *something more* than merely commuting, *it can be* in

violation of the internal revenue laws. It follows, therefore, that if the vehicle was used for *something more* than commuting and is violating some internal revenue laws it is subject to forfeiture pursuant to Section 7302, Title 26, United States Code. (Emphasis added.)

A review of the cases aids us in determining what has been held to be that *something more* than merely commuting. In the case of *United States v. General Motors Acceptance Corporation,* cited *supra,* in a situation involving the use of a truck in connection with the business of receiving wagers in violation of law, it was held that the truck in question was not used "merely for the convenience of the operator in commuting, but also as an active aid in violating the revenue laws, even though not for the transportation of any commodities subject to seizure" and, therefore, the court held the vehicle properly subject to forfeiture pursuant to Section 7302, Title 26, United States Code.

The court in the *General Motors Acceptance Corporation* case cited, *inter alia,* the case of *United States v. Lane Motor Company, supra,* and also cited the case of *United States v. One 1952 Lincoln,* 213 F. 2d 786, in which latter case the court pointed out that Section 7302, "does not place any express limitation on the manner in which property intended for use in violation of revenue laws is employed, nor does it require in terms that the liquor be transported in the automobile." It was also pointed out by the court in the *1952 Lincoln* case that the case is controlled by the *general* provisions for forfeiture contained in Section 7302, of the Code, and *not* by the more limited provisions of the forfeiture contained in the other sections of the Code. (Emphasis added.)

Article I, Section VIII of the United States Constitution reads as follows:

> "Section VIII,
>
> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
>
> . . .
>
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Pursuant to this Constitutional authority Congress passed the Internal Revenue Code. Section 7302 of the Internal Revenue Code was passed by Congress in order to implement the execution of its taxing power. Congress has the power to pass such an enforcement Section. Therefore, Section 7302 on its face and as applied and construed in this case is constitutional as falling within the innumerated powers of Congress as specified by the United States Constitution.

Respectfully submitted,

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Civil No. 389-57-Y

In the
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Libelant and Respondent,
vs.
ONE 1957 LINCOLN PREMIER TWO-DOOR HARDTOP COUPE, MOTOR NO. 57WA5592L, ITS TOOLS AND APPURTENANCES,
Respondent and Appellant.

Appeal from a judgment of forfeiture of an automobile in the United States District Court, Southern District of California, Central Division

Appellant's Opening Brief

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TABLE OF CASES AND AUTHORITIES CITED

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In the
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Libelant and Respondent,* vs. ONE 1957 LINCOLN PREMIER TWO-DOOR HARDTOP COUPE, MOTOR NO. 57WA5592L, ITS TOOLS AND APPURTENANCES, *Respondent and Appellant.*	District Court Civil No. 389-57-Y

Appellant's Opening Brief

This is an appeal from a judgment forfeiting one 1957 Lincoln Premier automobile, owned by Joseph D'Agostino, seized and forfeited by the government for alleged violation of the Internal Revenue laws.

I.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 2101, U. S. Codes. Judgment was entered on July 3, 1957 and notice of appeal was duly filed on July 18, 1957.

II.

STATUTES INVOLVED

Section 7302, Internal Revenue Code of 1954 provides as follows:

> "It shall be unlawful to have or possess any property intended for use in violating the provisions of the Internal Revenue Laws or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in Chapter 205, of Title 18, of the United States Codes, and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provisions of the Internal Revenue Laws or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence, relating to seizures, forfeitures, and disposition of property or proceeds for violation of the International Revenue Laws."

Fifth Amendment

> " . . . ; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

THE FACTS

The appellant was charged with receiving wagers on February 28 in this automobile (R. 6).

It was stipulated that the appellant was the registered owner of the vehicle and that he was not possessed of a federal wagering tax stamp (R. 3). It appears that on February 27, 1957, Officer Joseph S. Deiro, was conducting an investigation on bookmaking activities, at the location of 2602 West Grand Avenue, in the City of Alhambra (R. 4). He went to this address at about five fifteen o'clock, and the telephone at that address rang, and he advised the man who spoke through the telephone that he had arrested a Sam D'Agostino, for suspicion of bookmaking. (R. 7). The man suggested that the officer meet him in a 76 Gas Station, at Fremont and Main Street, in Alhambra, in twenty minutes; and he went to the location where he met Joseph D'Agostino (R. 7). At that time he had a conversation with Joseph D'Agostino, the owner of the automobile, leading to the arrest of his brother at the apartment, at which time Joseph D'Agostino stated it was his book and that all that he was interested in was getting a copy of the betting markers or getting a copy of the sheets. (R. 9). He had a Lincoln automobile which is the subject of the forfeiture. The officer said he could not give D'Agostino the sheets but he could let him copy them, and the appellant then copied the sheets. He had a conversation with the appellant regarding his bookmaking activities, and he stated that he had settled one of his

accounts at the fights. That is the only conversation he had regarding the use on his activities in the book-making field. He didn't say how he got to the fights. He gave the officer a hundred dollars in order to let him copy the betting markers, so that the persons who had bet with him would not put in a false claim against him, and in order to keep him from losing more money than he would have normally. The betting markers that he copied were those found at the house on a previous occasion, and on the 28th he had them with him. (R. 12). He copied both the sheets and the betting markers (R. 13, 14). All he did at the drive in stand was to drink some coffee with D'Agostino and have a conversation. (R. 15). When he saw D'Agostino he didn't give him any wager on any horse. He didn't bet with him (R. 16). Ira B. Dole, a police officer, of the City of Los Angeles, said he had a conversation with the appellant, in which the appellant related he used the car to make weekly visits to his brother's, where he would either pay or collect the amounts won or lost from them, and that on one occasion he would make a weekly visit to an agent who had three or four or five accounts, and he would either pay or collect the amounts won or lost from this agent. (R. 19). At the time he arrested D'Agostino, he had a copy of the sheet that his fellow officer had brought to him. The officer had decided to arrest the appellant at the time he met the fellow officer to copy the sheets, because in copying the sheets he believed he was violating some kind of law and he was going to arrest him. (R. 24).

The fellow officer brought the sheets out there, let D'Agostino copy the sheets. The officers, in arranging for a meeting with the appellant, were alert for the possibility of a seizure of a car (R. 28). A search was made of the automobile, and there were no betting markers, betting paraphernalia, except what were copies on yellow-ruled paper from the information the officer handed to him for him to copy and which he took from the appellant himself (R. 29). When he saw the appellant, he told him he was investigating the other officer having taken a hundred dollars (R. 31). After his fellow officer departed from the drive-in, he arrested D'Agostino. The automobile had not moved any place. During the interrogation, the name Lincoln car was mentioned by D'Agostino or himself. (R. 33).

The Lincoln automobile was seized on the 28th of February, 1957. Prior to seizing the automobile, there was no warrant of seizure (R. 37).

The appellant was called under Rule 43b (R. 38). He admitted he was the owner of a Lincoln automobile on February 28, 1957. He denied that he was a bookmaker on that date (R. 39).

Carl Anthony Landy testified that he had made arrangements with D'Agostino over the telephone to meet him at the drivein on Sunset and Vermont (R. 51). The police officer, named Joe Darrow, said something to the effect to Mr. D'Agostino, "If you want that information, you will have to come with me into

the car." The appellant, Joseph D'Agostino denied positively that he had any interest in the activities of his brother at the time he was arrested for bookmaking (R. 58). The discussion he had with the officer was that he asked the officer if it was possible to get the copy of the sheets for his brother as he did not want to get some false claims (R. 58). He said he gave Joe Darrow the hundred dollars as he didn't want his brother pushed around; and if he could get a copy of the sheets for his brother, he knew he would get a lot of claims the following day. (R. 58). He asked where his brother was and the officer told him his brother was still in his apartment. He said wait until he got down to the apartment and he would let him know if his brother had been taken downtown yet. (R. 59). He said his brother had never been in any trouble and he didn't want him to get pushed around and he then gave the officer two, tossed him two fifty-dollar bills. The officer said he would take care of his brother, and he wouldn't get pushed around. (R. 59). When he made the telephone call to where his brother was arrested, he was in Santa Ana, visiting his daughter. She had just come back from the East. She had just been married and he had gone to San Diego to see her (R. 60). He denied that he had any people he had accepted wagers from (R. 51). He denied that he had been engaged in bookmaking activities since two and one-half years before (R. 61). He never discussed the stamp tax with the officers (R. 62). He denied that he had told officer Holmes that he was engaged

in bookmaking activities or that he was leaving bookmaking. He said that he was concentrating on the clothing business. He said that he did not know that the phone in Alhambra was being used for bookmaking. He was surprised when he learned that his brother had been pinched for bookmaking (R. 64). He admitted a prior conviction of a felony for desertion from the United States Army (64, 65), and that he had been convicted of bookmaking (R. 66). Charles M. Holmes testified he is a police officer with the administrative night squad in the City of Los Angeles, that he had a conversation with the appellant during the arrest of the amount that he paid to the clerk in bookmaking establishments. He testified to various conversations with the defendant. In the second conversation, he told the officer he did not have a book going, that he had quit, that things were too hot. It was obvious that the officer had an informant who was turning in his spots (R. 72). In rebuttal, the government officer played a tape recording had with the defendant at the police station (R. 78). There was no statement in the recording that the appellant drove in his Lincoln automobile, except to the place where the meeting occurred between the officer and himself, with reference to copying the sheets involved.

III.

SPECIFICATION OF ERRORS

(1) The evidence is insufficient to support the findings and judgment. The judgment is contrary to the law and the evidence.

(2) Sec. 7301, of the Internal Revenue Act of (1924) was unconstitutionally construed and applied in this case.

Section 7301 inherently and as construed and applied violate the Fifth Amendment to the U. S. Constitution.

I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS AND JUDGMENT OF THE TRIAL COURT. THE FINDINGS AND JUDGMENT ARE CONTRARY TO THE LAW AND THE EVIDENCE.

The pleadings charged that the automobile was used for receiving wagers and that Joseph D'Agostino "was receiving wagers on a certain date (February 28) in this automobile." (R. 6.)

There is not one word to support this allegation of the complaint.

There is not even a scintilla of evidence that appellant ever received a wager in this automobile, nor that this automobile was used in "receiving wagers."

The words "receive" and "wager" and "in" are words well known, and well defined.

A bet or wager could be "received" "in" an automobile and an automobile could be used as a place where bets are made or received. But this is not the evidence.

The evidence is that a brother of the appellant, Sam D'Agostino was arrested at an apartment at 2602 West Grand Avenue for suspicion of bookmaking on February 27. (R. 7.) The arresting officer thereafter received a call from appellant who asked the officer to meet him at a "76" gas station at Fremont and Main Street, Los Angeles (R. 7) and to come alone.

At the subsequent meeting the appellant gave the officer two fifty dollar bills. Appellant had a conversation with the officer, stating all he was interested in was getting a copy of the betting markers, as he indicated, the sheets. (R. 9.) The officer stated it was impossible to get them right then and they made plans for a later date, which was the next day, February 28, 1957 at 3:30 p.m. At that time the officer and officer Holmes entered appellant's vehicle. (R. 10.) At that time the officer had the betting markers with him, and told appellant he could copy them. (R. 10.) He had a conversation with appellant in which appellant stated he settled one of his accounts at the fights. "That is the only conversation I had regarding the use on his activities in the bookmaking field." (R. 11.) He added "that he settled up with this party once a week at the fights." (R. 11.)

The markers are the markers he found *"at the house."* (R. 12.)

When the officer got in the car he did not give appellant any wager. (R. 16.)

Not one word in this or any subsequent evidence shows that appellant "received" a bet "in the vehicle."

Nor is there any evidence that appellant was engaged in accepting wagers on or about February 28, in the automobile.

We think fair construction of the statute, if constitutional, means that the automobile was used as a place for receiving bets—not that it was used as a means of transportation for the bookmaker. (See *U. S. v. Lane Motor Co.,* 344 U.S. 630.

The government called appellant as an adverse witness under Rule 43b (R. 39). He denied using the automobile to receive wagers. (R. 39.)

Carl Anthony Landi testified he is a clothing manufacturer at 8216 Lankershire Boulevard, North Hollywood and that appellant is his partner. That he was with him on the day appellant met police officers. (R. 52.) At no time while he was with appellant that day did he receive any wagers on any horses. (R. 50.)

Appellant denied being engaged in bookmaking activities for 2½ years (R. 63). By way of rebuttal and impeachment the government produced evidence of conversations of officers with appellant and a tape re-

cording (R. 68-75). The tape recording was offered as "admissions against interest." (R. 75.) The evidence is insufficient to show that the car was used for receiving wagers that any wager was ever made in the automobile.

Forfeiture statutes and pleadings must be strictly construed. Congress and not the courts should say so in clear, unmistakable language as it has done in Title 49, Section 781-2 in the case of narcotics, firearms and counterfeit money.

II.

SECTION 7301 OF THE INTERNAL REVENUE CODE INHERENTLY AND AS CONSTRUED AND AS APPLIED IN THIS CASE HAVE BEEN UNCONSTITUTIONALLY CONSTRUED AND APPLIED IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES THAT NO PRIVATE PROPERTY SHALL BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION.

A

Seizure and forfeiture of an automobile is a serious thing. Forfeitures are not favored. They should be enforced only when within both letter and spirit of the law.

Farmers & Merchants National Bank v. Dearing, 91 U.S. 29, 33, 35, 23 L. Ed. 196, 198, 199;
U. S. v. One 1936 Model Ford, 307 U.S. 225, 227.

B

As construed and applied in this case the government contends that because the appellant met a police officer to copy the O sheets and betting markers seized from his brother, at an apartment, that the automobile is to be forfeited. We respectfully submit that nothing in the statute, which must be strictly construed and applied, extends to such a doctrine. For which reasons and each of them we urge for a reversal of the judgment below and order to return the automobile to its owner, Joseph D'Agostino.

C

The Fifth Amendment to the U. S. Constitution forbids the taking of private property without just compensation. A forfeiture statute does that. Therefore the only property which may be taken is "contraband" which has always been considered subject to seizure. *Boyd v. U. S.*, 116 U.S. 616. But a statute which makes an innocent article, such as an automobile, subject to seizure by legislative fiat is contrary to the letter and spirit of the U. S. Constitution and unconstitutional and violates the Fifth Amendment to the U. S. Constitution.

Boyd v. U.S., 116 U.S. 616.

At common law in England forfeiture was the consequence of conviction and attainder on indictment for treason or felony. This was followed by forfeiture

of the life of the offender as well as his lands and goods. The forfeiture was to the King. The desire of the King and his officers to realize the profits of these forfeitures was one of the chief motives in instituting the circuit of King's Bench. "Attainder" was the inseparable consequence of the sentence of death. The consequence of attainder was forfeiture. Conviction of felony of any kind resulted in forfeiture of goods and chattels. But the Constitution of the United States forbids the passing of any bill of attainder.

We submit that the attempt to forfeit an automobile under the circumstances of this case is but an extension of the seizure of property by the Crown in England and the attainder now forbidden by our own Constitution.

For which reasons we pray for reversal of the judgment and an order restoring the vehicle to Joe D'Agostino.

Respectfully submitted,

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